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REPORTS

OF

515

CASES AT LAW AND IN EQUITY,

ARGUED AND DETERMINED

John

IN THE

White

SUPREME COURT OF ALABAMA,

DURING 1841.

BY THE JUDGES OF THE COURT.

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VOLUME II—NEW SERIES.

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HALE & PHELAN, PRINTERS.

1842.

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OFFICERS

OF THE SUPREME COURT, DURING THE TIME OF THESE DECISIONS.

JUDGES:

HENRY W. COLLIER, CHIEF JUSTICE.
HENRY GOLDTHWAITE, }
JOHN J. ORMOND, } ASSOCIATE JUDGES.

MATTHEW W. LINDSAY, ATTORNEY GENERAL.
JAMES B. WALLACE, CLERK.

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ERRATA.

- PAGE 32—Line 6—For *agreed*, read argued.
" 90—Line 16—For *duty*, read drily.
" 94—Line 17—*It*, should be stricken out.
" 174—Line 23—For *vendee*, read vendor.
" 181—For *Barnett* read Burnett.
" 195—For *Barnett* read Burnett.
" 203—Fourth line from bottom—for *recovered*, read recorded.
" 352—For *Duprey* read Dupuy.
" 354—For *Burness*, read Burruss.
" 375—Line 27—For *mode*, read rule.
" 400—Line 20—For *county*, read country.
" 535—For *Duprey* read Dupuy.

RULES

For the Regulation of the Practice in Chancery, adopted by the Judges of the Supreme Court, at the Term commencing in January, 1841.

1. THE Register of each Court of Chancery, shall enter upon his appearance docket, every cause with the name of each complainant, and each defendant—and shall enter upon the same docket, the day on which it was filed—and the returns of the sheriff made upon the subpœnas. This docket shall be carefully preserved as a record of the Court.

2. There shall be attached to each original bill a subpœna, upon which the Register shall enter copies of all the returns made by the Sheriff.

3. When a bill shall charge that any defendant is a non-resident of this State, if the complainant, his solicitor, or any credible person shall make affidavit in writing, before the Register or any Justice of the Peace, that such defendant is a non-resident of the State, and that such person is of lawful age, and shall state the place of his or her residence, it shall be lawful for the Register to direct publication to be made, for such person to appear at the next term of the Court in which the bill shall be filed. Such order of publication shall be made as follows: The order shall be published in some newspaper published in this State, to be selected by the Register, once a week for four weeks, and he shall, within fifteen days from the date of the order, cause the same to be posted on the Court-House door of the County in which the Court shall sit:—and if the residence of the defendant is known, the complainant, or his solicitor, shall, within the same time, send a copy to him,

through the mail—but if the affidavit shall disclose his residence to be unknown to the complainant, or his solicitor, it shall not be necessary to transmit such notice, but in such cases the Register may prescribe a publication for a longer period.

4. Subpœnas issuing against infant defendants, may be served upon their parents or either of them, if in life, and in case of death, upon the general guardian of such infants; and if there be none, then, if the infant is over fourteen years of age, upon the infant personally; and if under fourteen years, then upon such person as may have the maintenance and charge of such infant; and if any case, not provided for by this or some other rule, or by statute, shall occur, and proof be made before the Chancellor, he may direct the mode of service, or appoint a guardian *ad litem* for such infants.

5. Infants residing beyond the limits of this State, may be made parties, by publication according to Rule number three, provided, that the copy of the order of publication, instead of being sent to the infant, shall be sent to the persons mentioned in Rule number four, in the order mentioned therein. And if the residence of such parties be unknown, upon that fact being made known at the next term of the Court, the Chancellor may direct the appointment of a guardian, who shall not be required to answer for thirty days after he shall accept the appointment; and no decree shall be rendered against such infant at the term at which such guardian shall be appointed.

6. *Femes covert* may be made defendants by service of subpœna upon their husbands, if residents, or, by order of publication, if non-residents; and the order of publication shall be transmitted to the husband in all cases, except where the separate estate of the wife shall be the object of the bill, in which case, the subpœna shall be served on her, and the order of publication transmitted to her.

7. Domestic corporations shall be made defendants by a service of subpœna on the principal officer of such corporation. Foreign corporations shall be made parties by order of publication, a copy whereof shall be sent to the principal officer of the same—after the service of process in form aforesaid, it shall be lawful to enter a decree *pro confesso*, for the want of an-

swer, or an order for a *distringas* may be obtained to compel an answer against any domestic corporation.

8. The defendant shall file his answer within thirty days after the service of subpœna, or, in case of non-residence, within thirty days after the first day of the term to which the defendant is directed to appear in the said order. If the defendant shall fail to file such answer, but make default therein, the complainant may enter a decree *pro confesso*.

9. The Register shall keep a book, in which shall be entered all rules and orders which shall be taken in vacation. The solicitor of the party applying for any rule, or order, or decree, shall draw the same out with care, describing the cause, the date of the application, the notice which has been given to the adverse party, and if the decree, order, or rule shall be granted, the Register shall cause the same to be transcribed on the said book—which book shall be one of the records of the court.

10. Rules, orders, and decrees may be applied for every Monday, except in those cases in which a notice to the adverse party may be necessary—which shall only be applied for on the first Monday of every month, unless a special showing be made before the Register for such order, decree, or rule, at a previous date, provided, if the Register cannot get through his business on the days aforesaid, he may continue the applications from day to day until finished.

11. The Register shall have power to make orders allowing the amendment of bills, to allow complainants to file supplemental bills, to revive suits by bills of revivor, to allow the examination of witnesses *de bene esse*, to allow the examination of witnesses, and to make orders for the publication of testimony. These orders shall only be made upon a notice to the adverse party, setting forth the nature of the order applied for, which shall be served upon him, or his solicitor, at least five days before the day at which the application shall be made, and a copy thereof shall be filed with the Register.

12. All applications to the Register for orders or decrees, when a notice is required, shall be made in writing, setting forth the grounds on which the same is required; and all orders and decrees entered before him, shall be subject to objection or correction at the next term of the Court before the Chancellor.

13. A decree *pro confesso* may be entered in vacation, for want of an answer, against a non-resident defendant, after the time for answering has expired, and after such decree the complainants may proceed to take testimony *ex parte*.

14. In all cases a replication shall be considered as filed, unless the record shall plainly disclose that the cause is set down for a hearing on bill and answer by consent.

15. Amendments to bills and answers shall be made on a separate piece of paper, unless the amendment be of a brief or unimportant character, when it may be made by an interlineation or erasure, with ink of a different color from the body of the bill or answer; and the amendment shall be made in such a manner, that it may be ascertained in what it consists.

16. Amendments to bills shall be served upon the solicitor of the adverse party, within sixty days after the same shall be filed, or they shall be considered as waived; and the same shall be accompanied with a notice that an additional answer is required, if such is the fact, or, if no answer has been filed, or the defendant shall deem an additional answer necessary, he shall have thirty days from the service to file the same, and in case of a failure to file an answer in that time, the complainant may proceed as upon a default—and may cause a decree *pro confesso*, to be entered in the office of the Register.

17. Bills, upon which injunctions shall be ordered, shall be filed, and the conditions imposed upon the complainant shall be complied with, within twenty days after the date of the *fiat*, or the order shall be inoperative.

18. When a suit survives, either in favor of any personal representative of a decedent, or against a personal representative from whom no answer is required, it shall not be necessary to file a bill of revivor; but upon an application to the Register, the party may obtain a *scire facias* in favor of, or directed to such personal representative, which being served upon the adverse parties, it shall be lawful for the Register to enter an order of revival, unless cause be shown to the contrary by plea filed with the Register within thirty days after the service of such *scire facias*.

19. No final decree shall be taken against non-resident defendants at the first term after the order of publication shall be

made, unless there shall have been an appearance by such defendant.

20. No suit instituted by a *feme sole*, or in which she shall be a complainant, shall abate by intermarriage; provided, that at or before the second term of the Court after such intermarriage, the husband shall make himself a party—which may be done by a motion to the Court.

21. All orders of publication shall succinctly state the facts and objects of the bill. And whenever an injunction shall be granted, which is to operate upon a non-resident who is a party to the suit, the order of publication shall contain a recital of the matter on which the injunction is to operate, which shall be published according to the rules herein prescribed, by which non-residents are made parties to suits, and the operation of the injunction shall relate to the date of the first publication.

22. Whenever a party may desire to be present at the examination of a witness called against him, he shall give notice to the adverse party by filing a notice with his cross interrogatories, whereupon, it shall be the duty of the Register to prescribe the notice which he shall receive of the time and place of the execution of the commission.

23. It shall be lawful for a party, against whom a witness has been called, to re-examine the same witness, provided he has not filed cross interrogatories—and the examination of such witness, if made under this rule and be so expressed, shall operate as a cross examination of the said witness—and both parties shall have the liberty of being present at such examination; but it shall be the duty of the party wishing to examine such witness, to give notice at the time of filing his interrogatories, that he is desirous of being present, and the Register shall furnish the notice, that shall be given to the adverse party, of the time, place and person, before whom the commission shall be executed.

24. Where a party who has filed cross interrogatories, afterwards learns, that the witness has a knowledge of facts which he did not know at the time of filing his cross interrogatories, it shall be the duty of the Register, on affidavit made setting forth these facts, to order a re-examination as in the preceding rules.

25. All examinations, except in the cases provided in the three rules last mentioned, shall be conducted privately, and

the commissioner shall not be at liberty to furnish a copy, or give any information as to the contents of the testimony taken before him, to either party ; and in addition to the oath that the witness shall make to testify truly, he shall be required to make oath before some justice of the peace, that he will not communicate the contents of his testimony, until after the publication of the same in Court, and the commissioner and his clerk, if he employs one, shall make a similar oath before entering upon the execution of their duties.

26. Depositions shall be sealed up with the commission, by the commissioners, with the title of the cause endorsed on the envelope, and the package shall be directed to the Register at the proper place : publication of the testimony must be passed by the Court or before the Register, or it may be done by consent of parties in writing entered of record; after publication passed, no testimony shall be taken, except by consent or by special application to the Chancellor and allowance by him.

27. The complainants to a bill of interpleader intending to take testimony, must give notice to the parties required to interplead, and if the defendants, or either of them desire to take testimony they must give notice to the complainants.

28. Testimony *de bene esse* may be taken before answer filed, when the proof of a material fact depends upon the testimony of a single witness—where the witness is over sixty years of age, or where the witness is so infirm that the party fears that injury will result from delay, owing to such infirmity, or where the witness is about to remove permanently from the State. The application for a commission shall be made to the Chancellor in Court, or Register, according to the manner heretofore provided. In other cases of emergency, which shall be exhibited in the application, the Register may issue a commission for the examination of such witness at any time : and after an examination of a witness *de bene esse*, the party calling him shall not be required to make a further examination, but may use the testimony so taken—the opposite party shall have the right to examine such witness.

29. If an infant defendant reside out of the Chancery district, the Court of Chancery may issue a commission to cause a guardian to be assigned, and to have his answer taken ; and in case no application is made to the Court for the appointment of a

guardian by the infant, parent, guardian, or person in whose control the infant is shown to be, at the first term after service, it shall be lawful for the Chancellor to cause some competent person to be appointed; provided, that no decree shall be rendered at the term at which such appointment shall have been made, and that another guardian may be appointed at or before the second term, upon application to the Chancellor, and on a proper showing. Where an infant defendant is a non-resident, the Court shall have power to appoint a suitable person, residing in this State, guardian *ad litem*, after proof of the infancy of the defendant, his or her non-residence, and that publication has been duly made.

30. Where an infant defendant is over fourteen years of age, if resident near the place where the Court is held, his or her presence in Court shall be required, if practicable, and consulted as to the person he or she desires to be appointed guardian *ad litem*, which choice shall be ratified by the Court, unless obviously improper. But such choice may be made by the infant and his guardian, parent, or person under whose control he or she may be, in writing, before any justice of the peace, and such nomination duly certified, shall have the same effect as if the infant appeared in Court, if resident in any part of the State.

31. In mortgage suits, it shall be sufficient to bring in subsequent incumbrances to state that they claim some interest in the subject of the bill, and to pray for a subpœna to them: and the Court shall have power to decree a sale and direct the proceeds to be brought into Court without adjusting the priorities between such parties; unless there be some equity shown which makes it necessary—and any person whether a party to the suit or otherwise, shall have the liberty to present his claim by petition to the Court for the proceeds of the sale before distribution.

32. If it shall be discovered that there are subsequent incumbrancers, or parties in interest, not made parties to the cause, at any time before confirmation of the sale, in any mortgage suit, the complainant, or purchaser, shall have liberty to bring them before the Court at that stage of the proceedings, and if they make no opposition by answer, their interest may be fore-closed, without a re-sale of the property.

33. An injunction to stay proceedings at law, either before or after judgment, shall in no case issue, until bond and security have been given in such sum, and with such condition as the Chancellor or Judge may direct; on awarding an injunction for any other purpose, it shall be in the discretion of the Chancellor or Judge to require security.

34. If the complainant shall not, before the second term after filing his bill, have taken measures to bring in the defendant, his bill shall be dismissed.

35. Where a defendant resides out of the State, on the application of his solicitor, the Register shall issue a commission directed to one or more persons, to take and certify his answer—the affidavit to the answer shall be attached thereto, sworn to and subscribed by the defendant, before such commissioners, or one of them, and so certified by him or them. Where an affidavit to the bill or petition of a party residing out of the State is necessary, it may be taken and certified in like manner. The answer of a foreign corporation taken according to law, may be certified by commissioners appointed in like manner.

36. All demurrers shall state the matters of objection to the bill. If a demurrer be overruled, the defendant shall forthwith put in a full and sufficient answer.

37. A defendant may at any time move to dismiss a bill, or dissolve an injunction, for want of equity. When exceptions, to an answer, for insufficiency, have been filed and disallowed, the injunction shall thereby be dissolved without motion or further argument.

38. The unsuccessful party in a demurrer to a bill, exceptions to an answer, motion to dismiss a bill, or to dissolve an injunction, shall pay the costs thereof, unless the Court shall otherwise order.

39. When a cause is called for hearing, if the complainant does not appear; it shall be dismissed, if he appear, and the defendant does not, it shall be heard, and a decree rendered according to the claim and proof. Either party, on timely application, may set aside his default, on such terms as the Court shall impose.

40. At the hearing of every cause, the complainant's counsel shall furnish to the Court, a brief, containing a succinct state-

ment of the material facts stated in the bill, answer, exhibits, and testimony, the points raised, and the authorities on which he intends to rely ; if he fail to furnish such brief, he shall not be heard in argument.

41. A final decree shall be called in question, before the Court rendering it, by bill of review ; and shall never be impeached by original bill, unless on the ground of fraud.

42. Where a suit at law, and a bill in Chancery are instituted for the same claim or demand, the defendant, on suggestion, supported by affidavit, may move the Court to inspect the records, and if it appear that the two suits are for one and the same cause of action, it shall be ordered that the plaintiff elect in which he will proceed, and that he dismiss the other.

43. The sessions of the Register as master in Chancery, shall be held at his office, unless by consent of parties, he appoint a different place.

44. Exceptions to testimony admitted by the Register, must be taken before him, and certified in his report ; if not so taken the exception is waived.

45. The Register shall conduct all sales, made under decree of the Court, unless the decree otherwise direct, and the Court shall fix his compensation therefor.

46. The rules for the regulation of practice in the Courts of Chancery, heretofore adopted, and not embraced in the above are rescinded from and after the first day of May next, when the foregoing rules shall take effect.

A RULE OF PRACTICE

In the Supreme Court, adopted at the January Term, 1841.

WHENEVER a plaintiff or defendant in a cause in Chancery is dissatisfied with the decree therein rendered, such person may sue out a writ of error in the name of himself and his co-plaintiff, returnable to the Supreme Court; and the plaintiff in error may sever in the assignment of errors, or any one or more of them may assign errors, and the cause proceed to judgment without the necessity of a summons and severance as to the plaintiffs who do not join in the assignment; and the plaintiffs who have not caused the writ of error to be sued out, or in any manner aided in the prosecution of the cause in the Supreme Court, shall not be taxed with the costs here accruing.

A RULE OF PRACTICE

Adopted by the Supreme Court, at the January Term, 1841.

WHERE a judgment is reversed, either by the Circuit or Supreme Court, and the cause remanded, the case shall not be continued as a *matter of course*, at the next succeeding term of the Court to which it is sent back, but the party desiring a continuance shall show cause therefor, as in other cases.

RULE OF PRACTICE

For the Circuit Court of Mobile County, adopted June Term, 1840.

BENJAMIN F. PORTER, Judge of the Tenth Judicial Circuit of the State of Alabama, presented to this Court the following rule :

“In all suits to be commenced in the Circuit Court of Mobile County, instead of a *capias ad respondendum*, it shall be lawful for the plaintiff to serve the several defendants with a copy of the declaration, and a notice to appear at a regular term of the said Court to answer the same, which shall be served by the sheriff; and it shall not be necessary to file a new declaration, but the pleading shall be made to the declaration thus filed; and the clerk of the court, or plaintiff's attorney may sign and issue the same: *Provided*, this rule shall not extend to any bail or attachment process: *And provided further*, that the form of proceeding now in use may be employed by the plaintiff if he shall think proper to do so;”—

Which rule is approved by this Court for the regulation of process and pleading in the Circuit Court of Mobile County.

THE HISTORY OF THE

REIGN OF KING CHARLES THE FIRST

BY JOHN BURNET

IN TWO VOLUMES. THE SECOND VOLUME.

LONDON, Printed by J. Streater, at the Sign of the Gun, in St. Dunstons Church-yard, 1680.

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REPORTS

OF CASES ARGUED AND DETERMINED

JANUARY TERM, 1841.

LEE & NORTON v. THE INSURANCE BANK OF COLUMBUS, ET ALS.

1. A party who seeks the aid of a Court of Chancery, after a judgment at law against him, on the ground that he was ignorant of the defence, must show that, by the exercise of ordinary diligence, the defence could not have been discovered ; or that he was prevented from doing so by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his part.
2. A court of equity will not deprive a party of a legal advantage fairly obtained, where in *foro conscientiæ*, he has a right to retain the money in controversy.

Error to the Court of Chancery at Montgomery.

THIS was a bill in Chancery, filed by Henry P. Lee and Julius A. Norton, originally in the Circuit Court of Montgomery county, and afterwards transferred to the separate Chancery Court at Montgomery.

The bill charges, that the complainants were accommodation indorsers on a bill of exchange, for four thousand dollars, drawn by Mosely Hooker, on Bliss, Gause & Co. of New Orleans. The bill was also indorsed by H. Pierce & Co., and was made and indorsed to enable Hooker to raise money thereon, which he did, by selling the same to one Joseph Hutchinson, who was the agent of the Insurance Bank of Columbus, a chartered banking company of the State of Georgia, who supplied the agent with their own bank notes for that

purpose, and who purchased the bill in question at Montgomery, in this State. The bill was transmitted to the Bank, in Georgia, who, on its maturity, brought suit thereon against the complainants, in the name of Beverly Chew, for the use of Thomas Hoxie, a citizen of Georgia, and recovered judgment thereon. The bill further charges, that neither Chew nor Hoxie have any interest in the bill, but that the same is the property of the Insurance Bank of Columbus. The bill further charges, that the complainants *were ignorant* of the facts above set forth, until since the rendition of judgment.

The Insurance Bank answers and admits the material facts charged in the bill, except the ignorance of the respondents that Hutchinson was the agent of the Bank; as to which, it insists that by ordinary diligence it could have been discovered.

Chew and Hoxie also answered—but their answers are not material to the decision of the cause.

The Chancellor dismissed the bill for want of equity, from which the complainants prosecute this writ of error.

Mr. DARGAN, for plaintiff in error, insisted that a corporation of another State could not transmit its funds to this State, and, through the medium of an agent, carry on the business of banking within our limits; which he maintained was the character of this transaction. That it would be allowing to the citizens of other States, what was denied to our own. That, by the Constitution of Alabama, no bank could be chartered unless two-fifths of the capital belonged to the State. This, he insisted, was at least equal to a prohibition by the Legislature; and the comity of nations has never been extended so far as to permit foreigners to do that which was forbidden to the citizen, or which was against the policy of the country. He cited *Earle v. The Bank of Augusta*, 13 Peter's Rep. 519; and insisted that this case was distinguishable from that.

ORMOND, J.—The first question to be considered is, whether the Court has jurisdiction. The established doctrine of this Court is, that equity will not interfere after a judgment at law, unless the party can impeach the justice of the judgment by facts, or on grounds of which he could not have availed

himself, or was prevented from doing so by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part. *French v. Garner, et al.* 7th Porter, 549.

The ground alledged in the bill for not defending the suit at law is, that the plaintiffs in error were ignorant that the bill of exchange was the property of the Insurance Bank of Columbus, and had been purchased within the limits of this State by an agent of the Bank, and with its own notes placed here for that purpose. This ignorance of the facts is accounted for in the bill, by the statement that the plaintiffs in error were accommodation indorsers merely, and indorsed the bill to enable Hooker, the drawer, to raise money upon it. It cannot be presumed, in the absence of proof to the contrary, that he was not acquainted with the facts of the case; and we must suppose that an inquiry of him would have resulted in giving them the necessary information. This was not only a want of that diligence which the law exacts, but must be considered as culpable negligence.

Nor was this ignorance of the facts of the case attributable to the Bank; indeed it is not so charged in the bill. It is true, it is stated, that the suit was brought in the name of one Beverly Chew for the use of one Hoxie, who, it is charged, had no interest in the bill; but if the suit had been brought by the Bank, it would have given them no information of the defence now relied on. The *gravamen* of the bill is not that the bill of exchange was the property of the Bank, but that the bill was purchased within this State by the Bank with its own funds placed there for that purpose. These facts the plaintiffs in error might have known previous to the judgment at law, or at least they do not show that they made any effort to ascertain from their principal or from any other source, whether there existed any defence to the bill which they had indorsed. The result is, in the language of this Court, in the case of *Cullem v. Casey & Co.*, 1 Alabama Reports, 357, (new series,)—the plaintiffs must abide the consequence of a rule, which, although it may operate hardly in particular cases, the best interests of society requires should be inflexibly adhered to.

This view of the case dispenses with the necessity of examining the important and delicate question presented by the

counsel for the plaintiffs in error ; for, conceding that this position is correct, it would be a departure from the established principles of a court of equity to interfere and prohibit the collection of the money after a judgment at law. If the purchase of the bill, under the circumstances, was unauthorized by law, its value was realized by its sale, and, in *foro conscientiæ*, it ought to be repaid to the Bank. No equity therefore arises from the mere fact that the act was unauthorized, nor would it be equitable or just that a court of equity should deprive the Bank of an advantage fairly obtained by it at law. The question therefore of the legality of the transaction does not enter into the decision of this case.

These views dispose of the cause, and the decree is affirmed, with costs.

PRIM AND ABBOT v. DAVIS.

1. A plea of freehold and permanent residence in a county, other than that where the suit was commenced, is good as a plea in abatement when it states the facts which authorize an exemption from suit in that county, although it begins and concludes as a plea to the jurisdiction, but does not set out the proper jurisdiction in affirmative terms.
2. It is not essential that a plea in abatement should be verified by the oath of the defendant, or that it should be signed by him ; its truth may be shown by the affidavit of another person ; and it may be signed by counsel.
3. If an action of debt can properly be maintained on a bail bond, it does not follow that the action is local ; such an action is liable to be abated on the plea of the defendant if he is not sued in the proper county.

Writ of error to the Circuit Court of Dallas County.

ACTION of debt on a bail bond, executed by the defendant to the sheriff of Dallas county. Plea in abatement that the defendant, at the time when the suit was commenced, was a freeholder of, and a permanent resident in, Perry county of this State. The plea commences and concludes as a plea to the jurisdiction ; is signed by counsel, and verified by the

affidavit of one L. H. Davis. The plea was sustained on demurrer, and the plaintiff having replied, an issue on it was found for the defendant, who thereupon had judgment, &c.

The plaintiffs assign the judgment on the demurrer as error.

GEO. W. GAYLE, for the plaintiff in error, insisted—1st, that the plea should have prayed judgment *that the writ should be quashed*; and not, as it does, *whether the Court will take further cognizance*. 1 Chitty's Plead. 450; 3 Saund. 209, a note 1; Gould's Plead. 293.

2d. That the plea is bad, because the action is local, and must be in the same county where the record of the suit remains against the principal. 8 Term Rep. 153; 6 ib. 365; 13 John. Rep. 424; 13 Wend. 33; 1 Dunlap's Pract. 186.

3d. That it is bad as a plea to the jurisdiction, because the proper jurisdiction is not shown; and also, because it is signed by counsel instead of the defendant.

EDWARDS, contra, cited 1 Chitty, 450, 431; 2 do. 444; 1 ib. 219; 1 Stewart, 379; 7 Porter 10—to show that the plea was properly pleaded; but, if it was otherwise, then he insisted that the action of debt cannot, in this State, be sustained on a bail bond; and that the only remedy is by *sci. fa.*

GOLDTHWAITE, J.—1. We do not consider this plea to be irregular or defective either in form or substance. The facts, alledged by it to exist, make out a case of exemption from suit in any other county in this State except Perry county. It is immaterial to the defendant what other Court has jurisdiction, if he, by law, is exempt from that to which he is cited by the plaintiffs. He shows the facts, and properly prays whether the Circuit Court of Dallas will take further cognizance of a suit which he is exempted from by the statute.

2. The statute, which requires pleas in abatement to be verified by oath, does not direct by whom it shall be made. This plea is verified by the affidavit of one who is not the defendant, but we cannot say that this is irregular; or that by such a practice an undue facility is given to pleas of this description. The object of the affidavit is to apprise the plaintiff that the

plea is true in point of fact, and thus enable him to discontinue his action at the earliest period, and recommence it in a proper manner. The necessity to plead pleas in abatement in person, and that they should be signed by the defendant, grew out of a legal sophism, of which the form is preserved, although the substance has long ceased to have any weight. The form indeed continues as to the statement that the defendant comes in his own person; but we are not aware that any but counsel are required to sign a plea. It is certainly no cause of demurrer to omit the signature.

3. The action of debt is transitory, and may be instituted in any county where the defendant is properly suable. We cannot, on a demurrer to a plea in abatement, look back to ascertain if the declaration is bad; [2 Salk. 212] therefore we decline to determine whether the action of debt will or will not lie on a bail bond; but if it is a proper action it does not follow that it is local, because a *sci. fa.* on the bail bond would be so. The action, if it can be maintained, is transitory, and and is liable to be abated on the plea of the defendant, if he is not sued in the proper county.

THE STATE v. CLICK.

1. In an indictment founded upon a statute introductive of a new offence, it is sufficient to describe the offence in the terms of the act.
2. The third section of the act "To suppress the evil practice of carrying weapons secretly," which provides that the Secretary of State shall cause that act to be published for three months, &c., is merely directory, and the neglect of the Secretary to perform that duty, cannot defeat the legislative will.
3. Where no time is fixed for the commencement of the operation of a statute, it takes effect from its passage.

THIS cause comes here on questions referred as novel and difficult, by the Circuit Court of Jefferson.

The defendant was indicted in the words and figures following :

“The State of Alabama—In the Circuit Court, at April Term, A. D., 1839—Jefferson County, to wit : The grand jurors for the said State, upon their oath, present, that Mathew M. Click, late of the county aforesaid, on the first day of April, in the year of our Lord, eighteen hundred and thirty-nine, with force and arms, in the county aforesaid, did carry, concealed about his person, fire arms, to wit, a pistol; contrary to the statute in such case made and provided; and against the peace and dignity of the State of Alabama.

LINCOLN CLARK,

Attorney General of the State of Alabama.”

The defendant moved the Court to quash the indictment; which motion was over-ruled : and the cause being submitted to the jury, the defendant moved the Court to charge them—“that if they believed, from the evidence, that the statute on which the indictment was founded, was not published as required by said act ; and they believed, from the evidence, that the offence charged, was committed before the publication of the laws of the session, at which the law on which the indictment was founded, was passed, as required by the act for the publication of the laws of this State, that then they should find the defendant not guilty;” which the court refused : but charged, that the statute, on which the indictment was founded, was in force, and became the law of the land from and after the passage of the said act. The jury found the defendant guilty, and assessed a fine ; and judgment being thereupon rendered, the Court referred to this Court, as novel and difficult, the questions of law arising upon the several motions, as well as the charge given to the jury.

The ATTORNEY GENERAL, for the State.

Mr. PECK, for the defendant.

COLLIER, C. J.—The questions of law referred to this Court, are—

1st. Is the indictment on which the defendant was tried, drawn in conformity to the statute, which prescribes the offence charged ?

2d. Was it essential to the operation of the statute under which the defendant was indicted, that it should have been published in the manner it directs?

3d. When does a statute take effect, where no particular time is expressed?

1. In the *State v. Duncan*, [9 Porter's Rep. 260.] it is said, "where a statute is introductive of a new offence, and prescribes its constituents, without reference to anything else—in an indictment, founded upon it, it is sufficient to describe the offence in the terms of the act. [See also the *State v. Brown*, 4. Porter's Rep. 410.] The act, on which the defendant was indicted, enacts "that if any person shall carry concealed about his person, any species of fire arms, or any bowie knife, Arkansas tooth-pick, or any other knife of the like kind, dirk, or any other deadly weapon, the person so offending, shall on conviction thereof," &c. The indictment alleges that the defendant "did carry, concealed about his person, fire-arms, to wit, a pistol; contrary to the statute," &c. Here the offence is charged in the terms of the statute, and if the cases cited are to be followed, the indictment is unobjectionable.

Had the term "unlawfully" been employed in describing the manner in which the pistol was carried, it is not conceived that it would have imparted additional potency to the indictment. The statute which created the offence made its commission unlawful, so that, had that word been used, it must have been regarded as a mere expletive.

2. By the third section of the act it is provided "that the Secretary of State shall cause this act to be published for three months, in the papers of Mobile, Montgomery, Tuscumbia, Huntsville, Wetumpka, and Tuscaloosa." This provision is merely directory to the Secretary of State, and should certainly (as it doubtless was) have been executed according to its letter; but even if it had been entirely disregarded, yet as the operation of the act was not made to depend on its publication, the neglect of the Secretary of State to discharge his duty in this respect, cannot defeat the legislative will.

3d. In the case of the *Administrators of Weatherford v. Weatherford* [8 Porter's Rep. 174] the Court say, "A statute, according to the settled rule in the courts of the United States,

and of the States of the Union, where no time is fixed for the commencement of its operation, takes effect from its passage.” —[See also 1 Kent’s Com. 426.] This rule may sometimes operate harshly ; yet it is now too firmly settled, to be changed in any other mode than by legislation. The operation of the act in question not being postponed to a period subsequent to its passage, took effect immediately, and consequently the charge to the jury on this point is entirely correct.

It follows, from the view taken of the questions referred, that there is no error in the several decisions of the Circuit Court, and its judgment must be affirmed.

BROWN v. BARTLETT.

1. A judgment may be amended *nunc pro tunc* at a succeeding term of the Court if there be sufficient evidence to amend by.
2. The word “ dismissed,” found opposite the case on the docket of the judge, in his hand writing, will not of itself be sufficient to authorize an amendment of the judgment at a succeeding term, so as to make the defendant liable for costs.

Error to the Circuit Court of Pike County.

THIS suit was commenced originally before a justice of the peace, by the defendant, against the plaintiff in error, in which the former obtained judgment and the latter removed it by *certiorari* to the County Court of Pike county. The counsel for one of the parties being appointed judge of the County Court, the cause was transferred to the Circuit Court of Pike county—and at the Spring term 1839, of that Court the cause was, by the judgment of the Court, dismissed at the cost of the plaintiff. At the Fall term, 1840, of the Court, the following entry appears, “ ordered by the court that the judgment entered in this case at the Spring term of 1839, be so amended as to make the defendant liable for costs, for which execution may issue.” There is also sent up with the record a transcript

from the trial docket with the word "*dismissed*" opposite the case, and a certificate by the clerk that the word "*dismissed*" found on the trial docket, is in the hand writing of the presiding judge, and that no other memorandum or entry appears in relation to said cause. From the amended judgment the defendant below prosecutes this writ of error, and assigns that there was no authority to enter such judgment.

BURFORD, for plaintiff in error.

ORMOND, J.—It is objected for the plaintiff in error, that no amendment can be made in a judgment after an interval of one term—such is not the law, the amendment may be made at any time if the evidence is in existence, which will authorize it to be done. In the case of *Goldthwaite v. Wilkerson* [1 Stewt. & Por. 159] an amendment of this kind was made after the lapse of seven years.

What evidence will be sufficient to authorize the amendment of a part of the record *nunc pro tunc*, is largely discussed in the case of *Moody v. Keenar*, 9th Porter, 252. In the case of *Thompson & Miller*, [2d Stewart's, Rep. 470] it was held that such an amendment could not be made on oral testimony, and was only authorized "when predicated on matters of record or some entry made by or under the authority of the Court."

If we were at liberty to notice the entry on the trial docket, which the clerk states was a memorandum of the presiding judge, (but which is no part of this record) it would not justify the amendment made in this case. The word "*dismissed*," if it indicates, as it must be held to do, the disposition made of the cause at the first trial, did not authorize the amendment, as the judgment entered at the trial term, was in exact accordance with it. The cause could only have been dismissed by the plaintiff and at his own cost, unless by the agreement of the defendant, the costs were to be levied against him.

There does not appear therefore to have been any warrant for the amendment, none such appears in the record, and we cannot presume that any exists. Let the judgment of the Court, amending the previous judgment, be reversed.

WAMMACK v. HOLLOWAY.

1. The act of the 3d of February, 1840, which makes it the duty of the judge of the Circuit Court, (in vacation, and without providing any mode for a trial by jury,) to hear and determine whether an election for sheriff, has been legally or illegally conducted, and to certify the fact, when ascertained, to the Governor, in order that he may commission the proper person when the election is legal, or direct a new election when the first is declared void, cannot be construed as conferring judicial powers on the judge of the Circuit Court. Such a construction would bring the statute in direct opposition to the constitution, as it would in that event create a tribunal to determine between the conflicting claims of individuals to the same office, without providing any mode by which the right could be determined by trial by jury.
2. Wherever the constitution provides for the election of any civil officer, by the people, the right to exercise the office is derived from the election, and the commission issued by the Governor, is only evidence of the right. If one is commissioned who has no right, he exercises the franchise without authority, and it may be resumed by the State, when its judicial tribunals have ascertained the fact of usurpation in the mode prescribed by law.
3. The right to exercise an office is as much a species of property, as any other thing capable of possession; and to wrongfully deprive one of it, or unjustly withhold it, is an injury which the law can redress in as ample a manner as any other wrong; and conflicting claims to exercise it, must be decided in the same manner as other claims involving any other right, if either of the claimants insists on a trial by jury.
4. The proper construction of the act of the 3d of February, 1840, is, that the judge of the Circuit Court acts in the character of a supervisor of the election, and ascertains the *prima facie* right of one of the claimants to the office, or rejects the claims of all, if the election is void, in order that the executive may issue the commission to him who appears to be entitled, if the election is legal, or that the executive may order a new election, if the first was void, so that the office may not remain vacant during the progress of a judicial investigation, to the detriment of the public.
5. Notwithstanding this act, any one who considers himself entitled to an office, by virtue of an election, can ascertain his rights by a *quo warranto*.

MOTION for a writ of error, from this Court to the judge of the second judicial circuit, to review his decision in the matter of a contested election, with respect to the office of the sheriff of Dallas county.

GEO. W. GAYLE for the motion, cited the act of the 3d February, 1840, and insisted that the powers conferred by it on

the judge of the Circuit Court, were judicial, and consequently any decision under it must be subject to revision by this Court.

EDWARDS, *contra*, relied on the case of *Hill v. The State*, [1 Ala. Rep. 559] and agreed that the act of 1840, was not distinguishable in principle from the one then construed.

GOLDTHWAITE, J.—1. The motion which has been submitted on behalf of Mr Wammack, requires an examination of a recent statute directing the manner in which certain elections may be contested.

The three first sections point out the mode, by which notice shall be given, and direct how evidence shall be taken; but as these are unimportant in the consideration which we shall give the statute, they will not be recited. The fourth section directs, “that it shall be the duty of the judge of the Circuit Court, after the coming in of the testimony so taken as aforesaid, to hear and determine whether the said election has been legally or illegally conducted, and if, in his opinion, such election has been lawfully conducted, he shall certify the fact to the Governor, who shall thereupon commission the person, in whose favour the certificate appears; and should the judge of the Circuit Court determine the election to be void, upon a full hearing of all the facts and circumstances, and certifying the same to the Governor, the Governor shall thereupon order a new election.” The last section of the act repeals all laws contravening its provisions.

It cannot be denied, that the first impression made by the terms used in that act is, that it was intended to provide for an adjudication upon the respective and conflicting claims of individuals, to a right to exercise the offices which are enumerated in its first section, and amongst which is that of sheriff. If adjudication was intended, it is final, so far as the statute considers the subject, because immediate action is directed to be had, by the executive, on the certificate of the judge, and no mode is pointed out, by which the determination can be reviewed. Immediately after the adjudication, the whole subject passes from the judicial to the executive branch of the

government, and it is more than questionable, whether executive action, with respect to the commission or the new election, could be restrained, or the consequences of such action obviated, even if there could be a revision in this Court of the decision of the circuit judge. The act does not authorize any investigation into the facts connected with the election, by a jury trial, and if either party can lawfully require it, no means whatever are furnished by which it can be had; besides it is very obvious that the statute contemplates, that the Governor shall act upon the opinion formed by the judge, and that too, without the verdict of a jury. If the Legislature intended, by this enactment, to create a tribunal to determine upon the conflicting claims of individuals to a right to exercise an office, without affording to the claimants the means of a jury trial, then our duty would be to declare it invalid, because in direct conflict with the constitution.

2. We think it will not admit of doubt, that whenever the constitution provides for the election of any officer, he derives his right to exercise the particular office from the election; the commission from the executive, is only the evidence of the right. If one, who has no right, is commissioned, and acts, he exercises a franchise without legal authority; and it may be resumed by the State, whenever the judicial tribunals have ascertained the fact of usurpation in the mode prescribed by law.

3. An office is as much a species of property, as any thing which is capable of being held or owned; and to deprive one of, or unjustly withhold it, is an injury which the law can redress, in a manner as ample as it can any other wrong. [2 Black. Com. 263. 2 ib. 36 4 Bac. Ab. Office, G 297.] An office being a species of property, it is evident that conflicting claims to the right to hold it, must be decided in the same constitutional manner, as all other claims respecting property. It is certainly true, that the old writ of assize of office, has long since fallen into disuse, by the introduction of the more convenient remedy, by information in the nature of a *quo warranto*, in which proceeding, the franchise, if usurped, is seized by the State, and then conferred on the rightful claimant. The redress is not the less efficient, because the suit is conducted in the name of the State.

The tenth section of the bill of rights provides, that no one shall be deprived of his life, liberty or property, but by due course of law ; and the twenty-eighth section ordains, that the right of trial by jury shall remain inviolate. It is apparent, if the latter section was omitted, then there would be no constitutional prohibition of laws, by which one might be deprived of life, liberty or property, if under the constitution, such a court was so constituted as to consist of one or more judges ; but with that section, as it stands incorporated in our fundamental law, no citizen of the State can be deprived of, or debarred from the right of trial by jury, in all cases when it is allowed by the common law.

We need not cite authorities to prove, that by the common law, no one can be deprived of the right to exercise or hold a civil office, but by the judgment of his peers, as we have already shewn, that an office is a species of property.

These are some of the reasons which lead us to the conclusion, that this act is in violation of the constitution, if no other construction can be given it, than to consider it as investing an individual with authority, without securing any trial by jury, to adjudicate and finally determine on the validity of conflicting claims to the right to exercise an office.

4. We have before observed, that the first impression given by this act, is that it was intended to confer such an authority ; but if the terms used will bear a construction consistent with the constitution, then our duty obviously is, so to construe it. The constitution is silent with respect to the manner in which elections are to be conducted ; and also as to the mode by which the Governor shall be informed who is the person elected, to whom the commission should be issued. Although the Governor cannot adjudicate on the conflicting claims of those who were candidates, yet, public convenience demands that the office should be filled, and he is required to commission the person who may be elected. In order that the Governor may have the necessary information to direct his action, the law, previous to the enactment of this statute, provided the necessary means, most usually, through the certificate of the returning officer. The statute we are now considering, belongs to the same class of legislation. We have already said, that the Governor cannot adjudicate, and must act. The information

Ex parte, Tarlton.

which he derives from the certificate of the Circuit judge, is certainly entitled to as much weight as was the certificate of the returning officer under the previous laws. In neither case does the certificate affect the rights of any of the claimants; it merely gives the necessary information to the executive branch of the government, to enable it to act advisedly in issuing the commission. In our opinion, the proper construction of this statute is, that the judge of the Circuit Court acts under it in the capacity of a supervisor of the election, and ascertains the *prima facie* right of one of the claimants to the office, or rejects the claims of all, if the election is void; and this is done that the executive branch of the government may issue the commission to him who appears to be entitled, if the election is legal; and, that a new election may be directed, if the first appears, on the examination of the facts attending it, to be void. The necessity for such an examination, arises from the inconvenience which must result to the public, if such offices remain vacant during the progress of a judicial investigation.

5. It results from the construction which we give this statute, that Mr Wammack, if he considers himself entitled by the election to the office for which the commission has issued to another, can ascertain his rights by a *quo warranto*, as they remain unaffected by the decision of the Circuit judge.

The motion is denied.

EX PARTE, TARLTON.

1. The Supreme Court cannot issue a *remedial or original writ*, to a court of revenue and roads; unless, perhaps, where the Circuit Court of the county, has upon a formal application, refused its interference. *Semble*—it will be sufficiently early to resort to the Supreme Court, after the Circuit Court declines acting, or, having acted, mistakes the law.
2. A writ of error is not the proper mode for the removal of a cause from a court of revenue and roads, to a superior tribunal. Where a new jurisdiction is created by statute, and the court exercising it, proceeds in a summary method, or in a course different from the common law, a *certiorari* is the appropriate remedy.

TARLTON, by his counsel, presented to this Court the transcript of a record of the Court of Revenue and Roads of Montgomery county. From this transcript it appears that there was a controversy in that court, between Tarlton and William S. Hadnot, in respect to the establishment of a ferry across the Alabama river. The court granted a license to Hadnot to keep the ferry; and Tarlton, considering himself aggrieved, and being desirous of having the proceedings revised, moved this court for a writ of error, or other appropriate writ, by which that object may be effected.

GOLDTHWAITE, for the motion.

COLLIER, C. J.—There is no statute which provides for the revision, by this court, of a case such as that shewn by the record before us; and it is not necessary that we should take jurisdiction of it, in order to give to us “a general superintendence and control of inferior jurisdictions.” The revisory authority of the Circuit Court of Montgomery, is adequate to a re-examination of the case, and to afford relief as ample as the law can grant. This being assumed, it is clear that this court is impliedly inhibited from issuing a “remedial or original” writ to a Court of Revenue and Roads, unless, perhaps, where the Circuit Court of the county has, upon a formal application, refused its interference. [2 Sec. 5 Art. of the Con.] If the Circuit Court declines acting, or having taken jurisdiction of the case, mistakes the law, it will then be sufficiently early for a resort to this court.

We think a writ of error is not the proper mode for the removal of the case into the Circuit Court. In England, to which, in the absence of legislation, we look for rules to guide our practice and decisions, it is said to be well settled, that error does not lie, when the court whose judgment is complained of, acts in a summary manner, or in a new course different from the common law. [In the matter of *Negus*, 10 Wend. Rep. 38.] But in such a case the writ of *certiorari* is the appropriate remedy. In *Ruhlan v. The Commonwealth*, [5 Binn. Rep. 26. 7.] it was held to be a general rule of law, that where a new jurisdiction is created by statute, and the court exerci-

sing it, proceeds in a summary method, or in a course different from the common law, a *certiorari* is the only proper remedy. To the same effect, see *Savage v. Gulliver*, 4 Mass. Rep. 178. *Commonwealth v. Ellis*, 11 *ibid* 465. *Edgar v. Dodge*, *ibid* 670. *Ball v. Brigham*, 5 Mass. Rep. 406. *Bob (a slave) v. The State* 2. *Yerger's Rep.* 173. *Lawson v. Scott*, 1 *Yerger's Rep.* 92. *Wildy v. Washburn*, 16, *Johns Rep.* 49. *Sheet v. Francis*, 3 *Ohio Rep.* 277. It lies to remove a proceeding for the recovery of a fine for neglect of military duty; or to remove proceedings, laying out a highway. [*Commonwealth v. Coombs*, 2 Mass. Rep. 489. *Pratt v. Hall*, 4 Mass. Rep. 239.

Though the party who has submitted the motion to this court, has a clear remedy if he has been aggrieved, yet for the reasons stated, we must deny him the aid of this court in the situation in which he presents his case.

ADAMS, ET ALS. v. WHITE.

1. Upon a motion against a sheriff for the amount of a *feri facias*, upon a suggestion that the money could have been made by due diligence, and default made, it is necessary, to support a judgment against the sheriff, that it be found affirmatively by the jury, that the money could have been made by due diligence. A finding by them that the sheriff is liable for the amount of the execution, and ten per cent damages thereon, is not sufficient to authorize a judgment in a case of this summary character.

Error to the Circuit Court of Macon County.

THIS was a motion in the Circuit Court of Macon, against the plaintiff in error as sheriff, and others, as his sureties, under the statute, suggesting that the money could have been made by due diligence.

A written notice was served on the sheriff and his sureties, which avers the recovery of the judgment, that the execution which issued thereon came to the sheriff's hands—that he could

have made the money thereon by due diligence, and that the other defendants in the motion, were the sureties of the sheriff.

At the same term, during which the notice was served, the following judgment was entered:

This day came the plaintiff, by John Clark his attorney, and the defendant being called came not, but made default. On motion and suggestion to the court, that the money could have been made by due diligence, thereupon came a jury, &c. who say they find for the plaintiff the sum of one hundred and ninety one dollars eighty-three cents, and thirty-eight dollars thirty-six cents, being ten per cent damages, together with all costs of suit, for which execution may issue.

From this judgment a writ of error is now prosecuted by the defendants below, who assign for error—

That it does not appear that it was proven that Adams was sheriff, that the other defendants were his sureties—that Adams received, and did not return the execution—or that the money could have been made by due diligence.

The case was submitted by BASCOM, for plaintiffs in error, and PRYOR, for defendant in error.

ORMOND, J.—The act, under which this motion is made, is to the following effect—“ whenever any sheriff, &c. to whom an execution shall have been delivered, shall fail to make the money on or before the first day of the term of the Court to which such execution shall be returnable, and the plaintiff, or his attorney, shall suggest to the Court that the money could have been made by said sheriff or coroner with due diligence, it shall be the duty of the Court forthwith to cause an issue to be made up to try the fact; and if it shall be found by the jury, that the money could have been made by the sheriff or coroner with due diligence, judgment shall be rendered against the sheriff or coroner, and his securities, or any or either of them, for the sum of money specified in the execution, together with *ten per centum* on the amount of said execution, as damages and also the costs of suit. [Aikin's Digest, 175.]

This statute contemplated a summary remedy against the sheriff, and in cases coming within its purview, required no-

thing more to fix the sheriff's liability, than that the plaintiff should prove that the money could have been made by the exercise of proper diligence on the part of the sheriff. This fact, the statute requires, should appear by the verdict of a jury. If the sheriff had appeared and contested the allegations of the suggestion, the finding of the jury, under the authority of the case of *Currie v. The Bank of Mobile*, [8 Porter, 360] might have been considered sufficient. This judgment was by default, and although they could not, therefore, be a technical issue made up between the parties, it was, nevertheless, necessary that the jury should have found the fact "*that the money could have been made by due diligence*," as the right to enter judgment against the sheriff exists only in that event.

In this case, instead of finding this fact, they find that the sheriff is liable to pay the amount of the execution, and ten per cent. damages thereon. This, it is true, would have been the result of a proper finding by them, but it is a conclusion which they had not power to deduce. The uniform course of decisions in this State, upon proceedings of this summary character are, that where the judgment is by default, nothing can be intended, but that every thing necessary to the jurisdiction of the Court, must appear affirmatively. The liability of the sheriff depends upon the finding of a jury, of the want of diligence; this, where the judgment is by default, cannot be concluded out of the verdict of the jury, but must appear affirmatively.

The case of *Rountree v. Smith*, 1 Stewart, 157, is in principle like this. That was an action against a sheriff for an escape. The statute provides, that the sheriff shall not be liable, unless the jury find that the escape was with the consent, or through the negligence of the sheriff; and that he neglected to make fresh pursuit. The jury found a verdict for the plaintiff, without finding expressly, that the escape was negligent, &c., and upon this ground the case was reversed, notwithstanding the verdict of the jury must have been founded on the fact, that the escape was voluntary. Upon the ground that the jury have not found affirmatively, *that the money could have been made by the sheriff with due diligence*, the judgment must be reversed and the cause remanded.

LARCHER v. SCOTT.

1. When the appeal bond, taken by the justice of the peace before whom the cause was tried, shews the sum for which judgment was rendered, it is irregular to dismiss the appeal, although the justice of the peace has omitted to send a statement of the case to the appellate Court.

Writ of error to the County Court of Mobile County.

SCOTT sued Larcher before a justice of the peace, and the latter appealed to the County Court. The only papers sent up by the justice, are the warrant and the appeal bond. No statement of the cause is furnished by the justice; but the appeal bond recites the judgment rendered by him. The County Court dismissed the appeal, and awarded a *procedendo* to the justice. Larcher prosecutes this writ of error, and assigns that the County Court erred in dismissing the appeal.

STEWART, for the plaintiff in error.

No Counsel appeared for the defendant.

PER CURIAM.—The statute regulating appeals, requires the justice of the peace who decides the cause, to send a statement of it to the appellate Court; but his omission to do so, certainly ought not to prejudice either party. The recital of the judgment, which is contained in the condition of the appeal bond, furnishes sufficient evidence of its existence. [McAlpin v. Paul, Minor, 316.] The County Court should have proceeded to try the cause *de novo*.

Let the judgment be reversed and remanded.

CAMPBELL & WEBB v. WOODCOCK.

1. A commission to take the deposition of a witness, issued "to George W. Sneed, or any justice of the peace of Lauderdale county," &c. and was executed by "Joseph Bigger," who certifies that he is a justice of the peace of that county—*Held* that it was good as an authority to Sneed, but did not authorize any one else to take the deposition of the witness.

THIS cause comes up by writ of error from the Circuit Court of Mobile. The plaintiffs in error declared against the defendant in *assumpsit*, to recover the amount of a promissory note, as also for goods, wares and merchandise, sold and delivered &c. The cause was tried by a jury as on an issue, although there is no plea shewn by the record.

On the trial, the plaintiff excepted to a decision of the presiding judge, which excluded from the jury a deposition taken at their instance. The objection to the deposition was, that it was not taken by a commissioner duly appointed for that purpose. The commission is addressed as follows "To George W. Sneed, or any justice of the peace of Lauderdale county, &c." and was executed by "Joseph Bigger" who certifies that he was a justice of the peace of that county.

CAMPBELL, for the plaintiff in error.

STEWART, for the defendant.

COLLIER, C. J.—The deposition which was excluded at the trial, was attempted to be taken under the fourth section of the act of December, 1837—"To regulate the compensation of witnesses in civil cases, and for other purposes," [Pamphlet Acts, 1837, p. 26.] That section provides that "when any witness, whose evidence may be wanted in any cause depending in either the Circuit or County Court of any county of this State, shall live more than one hundred miles from the place where the Court may be held, in which such cause may be pending, the party desiring the benefit of the evidence of such witness, shall be permitted, and is hereby au-

thorized to take the same by deposition, in the manner now provided by law, for taking the evidence of non-resident, witnesses, &c.

The act of 1807 [Aik. Dig. 126.] directs that upon an affidavit being made of the materiality and non-residence of a witness in a cause, the Clerk of the Court in which the same is pending, shall issue a commission to one or more persons, to take and receive the deposition of such witness.

The commission, which issued in the present case, was certainly good as an authority to Sneed to whom it is addressed by name, but cannot, we think, be held to authorize "any justice of the peace," to execute it. Our statutes in regard to taking testimony by deposition, in cases at law, provide for taking evidence in a manner unknown to the common law; and a party who would avail himself of them, must (at least substantially) follow their directions. He must cause a commission to issue to "one or more persons" to take and receive the evidence of the witness proposed to be examined. It has been held, that if a commission be sent forth in *blank*, it issues to *no person*, and does not satisfy the requirements of the law; and though a clerk give his consent to a person receiving it to fill *all blanks*, this will not legalize it; for the authority of the clerk extends not beyond the time when it leaves his hands. [Worsham v. Goar, 4 Porter's Rep. 441.]

One of the objects of the act in requiring the names of the person or persons, who are to take the deposition, to be set out in the commission, was doubtless to advise the opposite party by whom the examination was to be superintended. At least it is important that this information be afforded by the commission, as it may determine the course of action to be pursued by him. He can then the more readily ascertain, whether it will be necessary for him to attend the examination of the witness in person, or by attorney, by acquainting himself with the characters of the commissioners. If they are men of integrity and intelligence, he may be willing to confide in their prudence and judgment, while, if it is uncertain whether they possess these qualifications, he may deem it safer to take measures to insure a full and impartial examination.

But where a commission issues to all or any of the justices of the peace of a county, it is entirely uncertain who may execute it; and perhaps the only means of ascertaining, will be to attend at the time and place appointed for its execution. The party against whom the witness is to be examined, may be willing to intrust the examination to some of the justices of the peace, while he may esteem others as wholly undeserving of confidence. Besides it would impose no small labor upon a party to learn who fills that office, in a populous county, three hundred miles distant from the Court, in which he is sued. These inconveniences are sufficient to shew that so wide a departure from the terms of the statute, as has been practiced in the case before us cannot be tolerated; and that consequently the judgment must be affirmed.

THE STATE v. MARLER.

1. A witness for the State was asked by the prisoner's counsel, whether he had not made certain statements to two persons, who were named, or any other person, which he denied. The two persons thus named were examined, and testified that he had made the statement imputed, when another being called, and the same question propounded to him, on motion of the solicitor he was not permitted to testify. The prisoner's counsel then proposed to call back the State's witness, and ask him whether he had not held the conversation imputed to him, with the last witness, which the Court refused. Held—that the Court ruled correctly, in refusing to permit the witness to testify; and that not permitting the State's witness to be called back, was a matter of discretion, and not revisable in this Court.
2. Where insanity is set up as a defence for the commission of crime, it should be established to the satisfaction of the jury, by strong, clear, and convincing proof. But if the jury entertain a reasonable doubt of the sanity of the prisoner, he should be acquitted.

Error to the Circuit Court of Montgomery.

THE defendant was indicted, tried and found guilty of murder, at the last term of Montgomery Circuit Court. The pre-

siding judge reserved certain questions for the opinion of this Court, as novel and difficult, on the following state of facts :

One of the witnesses for the State testified that, at the time the defendant gave the mortal wound, the deceased had not a gun. He was then asked by the counsel for the defendant, if he, the witness, had not, a short time after the killing took place, stated to one John Kelly, that deceased had a gun cocked and presented at the defendant, at the time he received the mortal wound, to which he answered in the negative. He was then asked, if he had not stated the same to one A. Sample, or to any other person, to which he also answered in the negative. The counsel for the defendant, after the evidence on the part of the State was closed, and after the introduction of Kelly and Sample, who both proved that the witness had the conversation with them which he denied, introduced one Armstrong, and offered to prove by him that the witness above referred to, a short time after the killing occurred, stated to him, that at the time the deceased received the mortal wound, deceased had a gun cocked and pointed, within a foot of the defendant's heart ; which evidence was objected to by the State, and the objection sustained. The counsel for the defendant then moved to call back the witness first above referred to, and ask him if he had not, at the time stated, had with the witness Armstrong, the conversation they expected to prove by him ; but the Court refused to permit the witness to be called back to ask him that question, but the Court reserved the points arising on the refusal to permit Armstrong to testify, and the first witness to be called back, as novel and difficult.

Evidence was introduced by the defendant, tending to show, that, at the time of the commission of the act, he was laboring under derangement of mind. Evidence was also offered, tending to prove, that a certain negro woman had been in the possession of the defendant for eight or ten years, and was, at the time the killing took place, in the possession of the deceased—that the defendant went to the house of the deceased, and ordered said negro home, that she refused to go—and evidence was also offered, tending to show, that deceased called for his gun, and had it cocked and presented at defendant, at the time the mortal stroke was given. The counsel for defendant mov-

ed the Court to charge, that if the jury entertained any reasonable doubt as to the sanity of the defendant, at the time of the commission of the offence, in that case, they should acquit him; which charge the Court refused, and upon this point charged the jury, that if the facts, necessary to constitute the crime of murder, had been established by the proof, that it devolved upon the prisoner to prove his insanity at the time of the commission of the act; and that, if the jury from the evidence, entertained a reasonable doubt of the prisoner's insanity at the time of the commission of the act, and believed, also, that it would be murder in him, it would be their duty to find him guilty of murder.

Among other charges given to the jury, the Court stated to them, that if they should believe the defendant went to the house of the deceased, without legal authority to take possession of the negro woman, while in peaceable possession of the deceased, under color of right, it was an unlawful act, which the deceased would be authorized to prevent by the application of force, necessary for that object; and if nothing short of slaying his adversary could prevent the designs of the prisoner, the deceased in protecting his possession might do so, while the defendant himself, should he have killed the deceased under the circumstances, as stated, in the forcible attempt to take the negro from the possession of the deceased, would be guilty of murder.

The several points of law arising out of the charges so given, are referred, by the presiding judge, to this Court, for revision, as novel and difficult.

GOLDTHWAITE, for the prisoner, insisted that, as the foundation was laid for contradicting the principal witness, by asking him, on his cross-examination, if he had not had the conversation with Kelly and Sample, which was imputed, and as those persons, on being called, contradicted his statement, it was a question of veracity between the witnesses of the State, and those of the prisoner; and that the prisoner had a right to call others, to whom the State's witness had told the same thing, for the purpose of corroborating his own witness. If that view is not correct, he then maintained, that the Court should have

permitted the prisoner to call back the State's witness, and lay the ground for the examination, by asking him the particular question. He referred to Starkie on Evidence.

The charge of the Court on the defence of insanity, he contended, was the very reverse of the law—that the defence of insanity was not different from any other defence set up in excuse of crime; and if the jury were satisfied beyond a reasonable doubt, that the prisoner was insane at the time of the commission of the act, they must acquit.

The ATTORNEY GENERAL, contra, cited 22 Com. Law Rep. 360. The Queen's case, 1 Russell on Crimes, 11. Roscoe on Criminal Evidence, 780.

ORMOND, J.—Questions arising on the law of evidence, from the universality of their application, are always questions of great interest. The rule to be expounded in this case, has a double object—it is not only adopted as a means of arriving at truth, but is also designed for the protection of witnesses. The credit of any witness might be destroyed, if it were permitted, after his examination, to call other persons to contradict his testimony in Court, by proving that he had made different statements to them, without first enquiring of him whether he had made such statements to them, as he might thereby recollect the circumstances attending the supposed conversation, if real, and perhaps be able to explain it.

In this case, the ground was laid on the cross-examination of one of the State's witnesses, by asking him, if he had not made different statements to two persons, who were named, or to any other person. The two persons to whom his attention had been directed, were examined, and contradicted him. The prisoner's counsel then proposed to call another, to prove that the witness had the same conversation with him. The counsel for the prisoner now insists, that he should have been received, on the ground that it was a question of veracity between the State's witness, and those who contradicted him, and that they had a right to support their witnesses. We do not consider that the reasons assigned, furnish any cause for departing from the rule above laid down. Until the witness for the State had been enquired of as to the last witness offered, it

cannot be known that he would have denied having had the conversation with him he is prepared to testify to ; he might admit and explain it, so as to make it harmonize with his testimony. As to fortifying their witnesses, who had contradicted the witness for the State, it is obvious that, by the contradiction which their testimony afforded, the object had already been accomplished. Whether it might not have been proper to admit such testimony, if the credit of the prisoner's witness had been assailed by proof, it is not necessary now to determine. As to the refusal of the Court to permit the witness for the State to be called back, for the purpose of laying the ground for the examination of Armstrong, we think it purely a matter of discretion, which cannot be reviewed in this Court. It might operate most mischievously, to permit the credit of witnesses to be thus impeached, after they had left the stand, and their evidence fully known ; and of this, no one can judge so well as the Court, in whose view the whole transaction passes.

The remaining question is one of much greater magnitude, and of some difficulty.

In civil cases, where there is conflicting testimony as to the existence of any fact necessary to be established by either party, the jury are under the necessity of weighing the evidence, and of deciding in favor of that party, on whose side the evidence predominates. But in criminal cases, the humanity of our law requires, that the guilt of the accused should be fully proved. It is not sufficient that the weight of evidence points to his guilt. The jury must be satisfied beyond a reasonable doubt of his guilt, or he must be acquitted. It is not meant here, that the evidence on which to found a verdict in a criminal case, should be so conclusive as to exclude the presumption, that notwithstanding the evidence, the accused might be innocent, but only that it should be of a character to raise that high degree of probability, on which all human action depends.

In what respect then does the question of *insanity*, when set up as an excuse for an act which would otherwise be a crime, differ from any other fact, which a jury may be called on to decide in a criminal case. As insanity excuses the commission of crime, on the ground that the actor is not an accountable being, it is obvious that society has a deep interest in

providing the means of preventing its being assumed as a cover for the commission of crime, and as this is more easily simulated, and depends more on the volition of the actor himself, than any other defence, which would excuse the commission of an act otherwise criminal, the interest of the public demands, that it should be established by more conclusive proof. Thus, in Arnold's case, who was indicted for shooting at Lord Onslow, and who set up the plea of insanity, Tracy, Justice, observed, that the defence of insanity, must be clearly made out; that it is not every idle and frantic humor of a man, or something unaccountable in his actions, which will show him to be such a madman, as to exempt him from punishment; but that where a man is totally deprived of his understanding and memory, and does not know what he is doing, any more than an infant, a brute, or a wild beast, he will be properly exempted from punishment. In Billingham's case, who was indicted for the murder of Mr. Percival, Mansfield, C. J., in reference to the plea of insanity, relied on for the prisoner, said, "that in order to support such a defence, it ought to be proved by the most distinct and unquestionable evidence, that the prisoner was incapable of judging between right and wrong; that in fact, it must be proved beyond all doubt, that at the time he committed the act, he did not consider that murder was a crime against the laws of God and nature, and that there was no other proof of insanity, which would excuse murder or any other crime."

These opinions, which are undoubted law, show the stringent nature of the evidence, by which insanity must be proved to be an excuse for crime; but we do not understand that even this defence, must be established by evidence so conclusive in its nature, as to exclude every other hypothesis. This would be requiring something akin to mathematical proof, of which the subject is clearly not susceptible; but that the jury must be fully satisfied, that the defence is made out, beyond the reasonable doubt of a well ordered mind.

To test the case at bar by these principles—the Court was moved to charge the jury "that if they entertained any reasonable doubt, as to the sanity of the prisoner, they must acquit him," which charge the Court refused. Upon the princi-

ples here laid down, it was error to refuse this charge. If the prisoner was insane, he was not an accountable being; and can the public justice of the country repose with safety upon a verdict found by a jury, every member of which may have entertained a *reasonable doubt* of its propriety. It would have been highly proper, that the Court, when called on thus to charge, should have explained to the jury, that this defence required to be made out by strong, clear, and convincing proof, and guided by these considerations, if they still entertain a reasonable doubt of the sanity of the prisoner, it was their duty to acquit.

The charge which was given by the Court, does not appear to be objectionable; but as it is probable the jury were misled by the refusal to give the charge asked for, the judgment must be reversed, the cause remanded, and the prisoner directed to remain in custody, to await a trial *de novo*; unless, in the *interim*, he shall be discharged by due course of law.

COLLIER, C. J.—I concur in the reversal of the judgment of the Circuit Court, but as I do not entirely assent to the opinion of my brother Ormond, I deem it proper, briefly to declare my views upon the only point of difference between us.

The charge, as prayed in regard to the prisoner's insanity, should in my judgment have been refused. It supposed, that the jury would be bound to acquit, if they entertained a reasonable doubt as to the prisoner's sanity. The law requires insanity, when alleged as an excuse for the commission of an offence, to be made out by proof, as full and satisfactory, as is required to establish the existence of any other fact. A reasonable doubt, whether the accused was sane, would not authorize his acquittal—there must be a preponderance of proof to shew insanity to warrant a verdict of not guilty for that cause.

But in my apprehension, the error consists in the charge given to the jury. They are informed, that if they entertain a reasonable doubt as to the prisoner's insanity, it would be their duty to regard him as sane, and if the facts established a case of murder, they should find him guilty. Now it was entirely possible for the jury to have entertained a reasonable doubt

of his insanity, although the weight of evidence was so strong, as to have lead their minds to the conclusion, that such was the prisoner's condition. This charge then must have induced the jury to believe, that the proof of insanity, should have been conclusive and irresistible. In this point of view, they may have been mislead. or have required proof too stringent. Hence I am in favor of reversing the judgment.

DEFOREST, MORRIS & WILKINS v. ELKINS.

1. When bail plead in abatement of the suit against their principal, (as they are permitted to do by statute,) the plea must alledge the existence of the facts which authorize them, as bail, to defend the suit.
2. When a plea in abatement is not signed by counsel, this is not a sufficient reason, to set aside the plea at a subsequent term ; nor is the objection available on demurrer.
3. A resident, who is served with process within the county of his residence, cannot properly be sued in another county, unless he is sued jointly with some other person, jointly liable ; and in such a case, the appropriate indorsement must be made on the writ, as required by the statute, or the suit may be abated on plea.

Writ of error to the Circuit Court of Autauga County.

ACTION of assumpsit, commenced in the Circuit Court of Autauga County, against Jones and Elkins, but discontinued as to the former, who was not served with process. Bail was required, and Elkins, when arrested by the sheriff of Shelby County, was bailed by one B. Davis. A plea in abatement was interposed at the appearance term, which purports to be pleaded by Elkins, in person, but is signed, with his name, by "Bennett Davis," his bail, and is verified by the affidavit of the same person.

This plea commences and concludes, a plea to the jurisdiction ; it alleges, that before and at the commencement of the suit, and from thence until the time of the service of the writ, the defendant, Elkins, was a resident of Shelby County, and

that the sheriff of that county, there executed the writ ; it also alledges the proper jurisdiction to be in the Circuit and County Courts of Shelby County.

The plaintiff demurred to this plea, and his demurrer is entitled of the same term as the plea ; but at a subsequent term, he moved the Court to set aside the plea, which is not signed by counsel. The Court refused the motion, and over-ruled the demurrer. This judgment on the demurrer, is now assigned as error.

PRYOR, for the plaintiffs in error, insisted that, the plea should have been stricken out, as it was not signed by counsel ; it was bad on demurrer for the same reason, and because the facts were not alledged in the plea, which alone could give the bail, the right to defend the suit, even if it was questionable, whether bail can, in any case, plead in abatement.

But the plea is also bad, because it is immaterial where a person, who is not a freeholder, is sued. The act of 1836, authorizes the process to be directed to, and served by the sheriffs of the State ; and a non-freeholder has no exemption. Besides this, it may be, that Jones, the other defendant, was a resident of Autauga County, and then both defendants could be sued there. This fact should have been negatived by the plea.

J. B. CLARKE, contra.

GOLDTHWAITE, J.—1. My opinion is, that the bail to an action, is not, under the statute referred to, entitled to plead in abatement ; but a majority of the Court incline to view the statute differently. However this may be, we all agree, that if a plea in abatement can be pleaded by bail, the plea filed by them, must state the facts, which, under the statute, authorize them to defend the suit. The plea in this case, therefore, cannot be supported as the defence by bail ; but this is an immaterial question, because there is nothing on the face of the plea to lead to the conclusion that it is pleaded by the bail. Elkins is said to come and defend, and it is only from the signature to the plea, and the affidavit by which it is verified, that we are apprised of any connexion of Davis with the defence.

2. In the case of Prim & Abbot v. Davis, we decided, during the present term, that it was unnecessary, that a plea of this

kind, should either be verified, or signed, by the defendant. It is proper, that all pleas should be signed by counsel; but an omission to do so, is no sufficient reason to set aside a plea in abatement at a subsequent term, nor is the objection available on demurrer.

3. Our investigation is thus narrowed to an examination, whether a resident, who is served with process in the county of his residence, can properly be sued to another county, when nothing appears on the process to warrant the jurisdiction.

An examination of the several statutes, bearing on this question, will be necessary for the proper understanding of our decision.

The eleventh section of the act of 1807. [Digest, 267, s. 53] provides, that all transitory actions shall be commenced in the county in which the defendant may be found.

The twelfth section of the same act. exempts resident freeholders from suit, in any county but that in which they permanently reside. And the thirteenth section, provides, that persons jointly liable, may be sued in the county where any one of them may reside; but, in such a case, several writs, to the several Courts, are to be indorsed that they are for one and the same cause of action; otherwise, they may be abated on the plea of the defendant.

Neither of these sections provided for the service of process, when the defendant withdrew to another county. This defect was remedied, to some extent, by the act of 1818, [Digest, 279, s. 115] which provided for the service of process, on such a defendant, in an *adjacent county*. The process, however, was directed to the sheriff of the county, where the defendant was resident, or there commorant, and could only be executed by him or his deputy, in the adjacent county.

Next came the act of 1836, [P. P. 25] which removed the difficulties we have adverted to, and it is under this act, that the plaintiffs consider they are authorized to proceed as they have. Its terms are as follows: "Hereafter, all original, mesne or final process, shall be directed to any sheriff of the State of Alabama, and it shall be the duty of any sheriff, in whose hands such process may be placed for service, to execute and return, or to return, if it cannot be executed, the same as re-

quired by law, when process is specially directed to him : *provided*, that no bail writ, or *ca. sa.* shall be executed on any defendant, who is a freeholder in the State, out of the county of his permanent residence, or any adjoining county, unless the plaintiff, his agent or attorney, shall first make affidavit, that the defendant has left the county of his residence, for the purpose of evading service of the process, in the proper county,"

It is obvious, when these several statutes are collated, that the act 1836 makes no change whatever, in the jurisdiction of the several courts over defendants ; but leaves it precisely as it was by the act of 1807.

The only case, by the act of 1807, in which a writ returnable to one county, can be served in another, is when two or more persons are sued for some joint cause of action. The act of 1818 enlarged the authority of sheriffs, and authorised the service of process returnable to one court, to be made in an adjacent county, and the act of 1836, makes the service by any sheriff proper.

It was not necessary for the plea in this case, to negative the presumption, that Jones, the co-defendant, was a resident of Autauga County, because no such presumption necessarily arises ; and because if such was the case, the writ would, notwithstanding, be liable to abatement, as it has not the proper indorsement to suit such a state of fact.

The defendant being a resident of Shelby County, and being there served with process, was not liable to be sued in Autauga County, except as provided for by the act of 1807, before examined. The want of jurisdiction is properly shown by the plea, therefore there is no error in the judgment of the Circuit Court, and it is accordingly affirmed.

BOYCE v. HOLMES.

1. It is a rule of construction, founded on the principles of *general jurisprudence*, that a statute is not to have a retrospective effect, beyond the time of its enactment.
2. The act of 1836, "for the relief of tenants in possession, against dormant titles," which secures to persons, under some circumstances, who are ejected by paramount title, the value of improvements made upon the premises during their possession, does not operate retrospectively, so as to entitle them to recover the value of improvements, made previous to the passage of the act.

THE plaintiff in error brought an action of trespass, in the Circuit Court of Dallas, to try titles to two lots, situated in the town of Cahawba, and to recover damages of the defendant as mesne profits, in consequence of their occupancy by him.

The defendant pleaded "not guilty," and filed a suggestion under the statute, in which he insists, that he and those under whom he claims, have had adverse possession of the lots in controversy, for three years, and have made valuable, and permanent improvements on the same, &c. To this suggestion, the plaintiff demurred, but his demurrer was overruled, and the case submitted to the jury, who returned a verdict in favor of the plaintiff's right, to recover the possession of the premises, but assessed the value of the improvements made by the defendant, and those under whom he claims, at *fourteen hundred dollars*.

On the trial, the presiding judge sealed a bill of exceptions, from which it appears, that the "improvements were mostly made" previous to the eighth of January, 1836, and that the Court charged the jury "that the defendant was entitled to the value of all the improvements made by himself, and those under whom he claimed, whether made before or after the passage of the act of that date; provided they were made under an adverse possession."

Judgment being rendered in conformity to the verdict, the plaintiff has prosecuted a writ of error to this Court.

EDWARDS, for the plaintiff.

J. B. CLARKE, for the defendant.

COLLIER, C. J.—It is unnecessary to consider the sufficiency of the suggestion, as the question proposed to be raised upon the demurrer, is brought directly to the view of the Court, in the instructions to the jury.

The inquiry is, does the act of the eighth of January, 1836, “for the relief of tenants in possession, against dormant titles” operate retrospectively, so as to entitle persons, holding adversely to the rightful owner of land, to compensation for permanent and valuable improvements, made previous to its passage; or does it only confer upon the adverse possessor, the right to be compensated for such improvements, made subsequent to that event.

So much of the act, as it is necessary to examine, is in these words “that in any suit which shall hereafter be commenced in any of the Courts of this State, for the possession of lands or tenements, it shall be lawful for the defendant. at any time before the trial of such suit, to suggest to the Court, that he and those persons whose estates he has in the lands or tenements sued for, have had adverse possession of the same, for three years, next before the commencement of such suit, and that he and those persons whose estate he has, have made permanent and valuable improvements on the lands sued for, during the time he or they have had adverse possession of the same. And the jury trying the suit, if they shall find for the plaintiff, shall at the same time inquire if the suggestion so made be true or false; if false, they shall return a verdict as in ordinary cases for the damages sustained; but if true they shall assess the value of the improvements, at the time of the trial, which have been made by the defendant, or by those whose estate he has; and shall assess the value of the lands or tenements, which they shall return a verdict for, and shall also assess the value of the use and occupation of the same, without considering the increased value thereof, by reason of such improvements, as shall have been made by the said defendant, or by those whose estate he has. And if the value of the use and occupation as assessed, shall exceed the value of the improvements as assessed, the Court shall render a judgment against the defendant for the excess.” [Pamphlet acts, 20.]

It is a rule of construction, founded on the principles of general jurisprudence, that a statute is not to have a retrospective effect beyond the time of its enactment. In *Calder & wife v. Bull & wife* [2 Dall. Rep. 386.] Mr. Justice Chase held, that every law that takes away or impairs rights, vested agreeable to existing laws, is retrospective, and is generally unjust; and that it is a good general rule, that a law should have no retrospect. Chief Justice Kent in *Dash v. Van Kleck* [7 Johns' Rep. 477.] is quite as explicit. "The very essence of a new law," says he, "is a rule for future cases." The construction contended for on the part of the defendant, would make the statute operate unjustly. It would make it defeat a suit already commenced upon a right already vested. Nothing could be more alarming than such a subversion of principle. It is a principle of the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect. *Nova constitutio futuris formam imponere debet, et non præteritis.*" To the same effect are *Ogden v. Blackledge*, 2 Cranch's Rep. 272. *Fisher v. Blight*, ibid 386. *Beadleston v. Sprague*, 6 Johns' Rep. 101. *Osborn v. Huger*, 1 Bay's. Rep. 179. *The People v. Tibbetts*, 4 Con. Rep. 384. *Bedford v. Shilling*, 4 Sergt. & Rawle's Rep. 401. *Ogle v. The Sommerset and Mount Pleasant Turnpike Com.* 13 ibid 25. *Philips v. Gray*, Admr. 1. Ala. Rep. N. S. 226. *The Society, &c. v. Wheeler*, 2 Gall. Rep. 139. *Woart v. Winnick*, 3 N. Hamp. Rep. 473. *Dow v. Norris*, 4 ib. 19. *Miller, et al. v. Dennett, et al.* 6 ib. 109. The English statute of frauds in its terms, embraces the contracts denounced by it, on which no suit had been then brought. It enacts "that from and after the twenty-fourth day of June, no action shall be brought," &c. Very soon after its passage, the question arose whether it should extend to agreements, made previous to that event. In *Gilmore v. Shuter*, [2 Lev. Rep. 227.] it appeared that on the day before that on which the statute of frauds took effect, a verbal promise was made to give, or bequeath a sum of money in consideration of marriage. An action being brought against the executors of the promisor, the question made, upon a special verdict, was, whether the promise not being in writing was within the 29 Car. 2 c. 3. The

Court said "It cannot be presumed that the statute was to have a retrospect, so as to take away a right of action, which the plaintiff was entitled to, before the time of its commencement." And the Court put the case of a will executed without the formalities required, which they said would be valid, if made before the act, although the testator survived its passage, [see *Ashburnham v. Bradshaw*, 2 Atk. Rep. 36 *The Attorney General v. Lloyd and others*, 3 Atk. Rep. 551.

The English statute of frauds is not less direct and positive in its terms than the act we are examining. According to their literal import, they apply alike to actions thereafter to be brought, without regard to the time when the rights of the plaintiffs vested.

In the case at bar, if the plaintiff had a right to the lots when the improvements were made, his right to the improvements then vested, and he was entitled to recover them as an incident to the land itself. In respect to the greater part of the improvements, there was no law obliging the plaintiff to compensate the defendant in the event of his ouster from the possession; and though the act of 1836 modifies the law in this particular, yet according to a well established rule of construction, we must intend that the Legislature did not mean to divest rights already acknowledged by the law. But that a new rule of action was prescribed, by which rights should thereafter arise and be adjusted.

We will not undertake to say that the act of 1836, cannot be literally interpreted, consistently with the constitution—the view which we take of this case relieves us from the examination of that question. Our conclusion is placed alone upon the rule of construction to which we have referred.

The judgment is reversed and the cause remanded.

JONES, ET AL. v. SCOTT.

1. No certain rule can be laid down, as to the quantity or quality of the preliminary proof, necessary to be made, to authorize the introduction of secondary evidence of the contents of a lost instrument. But it is, in general, true, that much stricter proof will be required of the loss, and a more rigid search exacted, in a case where any motive for the suppression of the instrument may exist, than will be required, when, from the circumstances, no fraud can be presumed—as where a written copy exists, made under such circumstances, as to preclude the supposition, that the copy was fraudulently made.
2. When a lawyer employed to bring a suit, testified that he had made a copy of a bill of lading on a writ, in a suit he was employed to bring; that he had made diligent search for it among his papers, and could not find it, and was under the impression he had returned it to Sims & Scott, the plaintiffs—and the surviving partner of Sims & Scott, also testified, that he had searched for it among the papers of the firm, and could not find it, and had also examined the papers of the deceased partner, though for a different purpose, without seeing it—held, sufficient to authorize the introduction of secondary evidence, of the contents of the lost paper.
3. A residuary legatee cannot be a witness in a suit, the result of which may augment or diminish the fund in which he may participate.
4. All depositions are taken *de bene esse*, and although a witness was competent when his deposition was taken, it cannot be read in evidence, if he is incompetent at the time of the trial.
5. J. & H. in Mobile, and S. & S. in Tuscaloosa, were joint owners of a steamboat, and had been engaged in running it as a general freighter, between Mobile and Tuscaloosa, S. & S. without the knowledge of J. & H., sold their interest to H. & D., who were the former Captain and Clerk of the boat, and shipped on board the boat, one hundred bales of cotton for Mobile. On the downward passage, the boat was sunk, and the cotton lost—held, that although a stranger could recover from J. & H. for a loss caused by negligence or want of skill, notwithstanding the sale of the interest of S. & S., that S. & S. could not, without proof, that J. & H. either expressly or by implication, consented to run the boat for freight, in partnership with the new joint owners.
6. One joint owner of a steamboat may sell his interest in the boat, without the assent of the other proprietors, and the purchaser will become a tenant in common with the other joint owners.

Error to the Circuit Court of Tuscaloosa.

THIS action was brought originally by Sims & Scott, and now carried on by Scott, as surviving partner, against the defendants, to recover the value of one hundred bales of cotton, lost on the steamboat Warrior.

The plaintiff obtained judgment, and the case is brought here on a bill of exceptions. The plaintiff, to prove the loss and the contents of a bill of lading of the cotton, offered to read the deposition of Aaron Reedy, taken some years since, on the ground that he lived more than one hundred miles from the place of the trial, where he still resides. Mr. Reedy has married the daughter of Mr. Sims, the deceased partner of the plaintiff. By the will of Mr. Sims, the wife of Mr. Reedy is a legatee; he has also a legacy given him by the will, and is a residuary legatee. The defendants moved to exclude the deposition, on the ground that Reedy was interested in the event of the cause, but the Court permitted it to be read, to which the plaintiff excepted.

As a ground for introducing secondary evidence, of the contents of the bill of lading, the plaintiff proved, by the deposition of Reedy, that he once had possession of the paper, to bring this suit; that he made a copy of it on the back of the writ, that it is lost or mislaid, and that after diligent search, he cannot find it—that he was satisfied he made a true copy on the writ; the bill of lading was signed by J. W. Donaldson, the clerk of the boat. It was also proved, that it was customary to make three bills of lading, one of which was kept by the boat, one by the consignor, and one sent to the consignee. The deposition of McLoskey, one of the consignees, was read, and proved that he did not know that his house had ever received a bill of lading for this cotton; that there had been one bill of lading lost, which they had not been able to find. The plaintiff proved, that he had examined the papers of Sims & Scott, and could not find the bill of lading; and had looked over the private papers of Sims, for another purpose, but did not see it. Notice was given the defendants, to produce the copy in their possession. Upon this testimony, the Court permitted secondary evidence to be given of the contents of the lost paper, to which defendants excepted.

It was also proved, that the boat had formerly been owned by the defendants, Jones & Horner, and the plaintiffs, Sims & Scott; and that the boat had been run by them on joint account, for freight. These were all wealthy men, the former living in Mobile, and the latter in Tuscaloosa, at which time,

the defendant, Hammond, was captain, and defendant, Donaldson, clerk of the boat. It was also proved, that during the Summer and Fall of 1828, the boat lay at Tuscaloosa, and was lost on her second trip down the river. Articles of agreement, entered into between Sims & Scott, and Donaldson & Hammond, dated, 9th September, 1828, were also offered in evidence, by the defendant, by which the former sold to the latter, one half the boat; but there was no proof that the defendants, Jones & Horner, knew of the sale, and proof was offered, conducing to shew, that they were not apprized of it.

Upon this evidence, the Court charged the jury, that if they believed from the evidence, that the cotton was shipped under the agreement between Hammond & Donaldson, and Sims & Scott, the freight to go towards the payment of the debt incurred by the former, in the purchase of Sims & Scott's interest in the boat; that then the defendants, Jones & Horner, not having notice, and assenting thereto, were not responsible for the loss of the cotton. The defendant's counsel moved the Court to charge the jury, that if they believed from the evidence, that the defendants, Jones & Horner, had no notice of the sale from Sims & Scott, to Hammond & Donaldson, before the loss, that then they should find for the defendants, Jones & Horner, which charge the Court refused, to which the defendant excepted, and now assigns as error, the questions of law arising out of the bill of exceptions.

ELLIS & PECK, for plaintiffs in error.

J. L. MARTIN, contra.

ORMOND, J.—The questions presented on this record, are—First, was the preliminary evidence offered by the plaintiff, sufficient to authorize the introduction of secondary evidence, of the contents of the bill of lading. Second—had the witness, Reedy, such an interest, as would prevent him from testifying in the cause. Third, can the defendants, Jones & Horner, be made liable, as partners, at the suit of the plaintiffs, without notice that the plaintiffs had withdrawn from the partnership.

1. No fixed rule can be laid down, as to the quantity or quality of the proof, necessary to be adduced, to authorize se-

condary evidence of the contents of an instrument, alledged to be lost or mislaid. It is, however, true, that, in general, examination and enquiry must be made, where the instrument was last known to be, and that when the presumption can arise, that the paper may be improperly withheld, much stricter proof will be required of the loss, and a more rigid search exacted, than in a case where no such presumption can be made. As where the lost instrument is evidence of a fact, capable of being proved by extrinsic testimony, and especially, where a written copy exists, made under such circumstances, as to render it highly improbable, that any fraud could be intended.

Tried by these rules, it will be found, that the preliminary proof offered in this case was ample. The fact recited in the bill of lading, was one of notoriety, and susceptible of certain proof, and the copy made of the original, on the writ, at a time when it must have been presumed, that the other copies were in existence, in addition to the publicity thus given to it, affords convincing proof of its correctness, and by the absence of all motive, precludes the idea that any fraud could be intended, by the suppression of the original. The proof of the loss, by the person into whose hands it was last traced, is complete, besides additional proof from those into whose hands it might have come. The evidence was, therefore, sufficient to authorize proof of its contents. [See the cases of *Mordecai v. Beale*, 8 Porter, 529, and *Swift v. Fitzhugh*, 9 Porter, 39.]

2. The question of the interest of Mr. Reedy, is one of some difficulty. His deposition was taken some years since, and when he was competent, under the act allowing the depositions of witnesses, residing more than one hundred miles from the place of trial, to be taken, where he still resides. His supposed interest in the suit, arises from his being a legatee of Sims, the former partner of the plaintiff, Scott, the object of this suit being to recover a partnership demand.

The counsel for the plaintiff in error, contended, that the witness is directly interested in the event of the suit, being not only a specific, but also residuary legatee, under the will of his father-in-law. That if this judgment is recovered, it will either discharge so much of the partnership debts, and thereby re-

lieve the estate of Sims from contribution, or, if the partnership is not in debt, will increase the estate by the amount of one half the recovery. While, on the other hand, it is maintained, that the interest of Reedy is altogether contingent; and it is likened to the case of a creditor of a deceased person, called on by an executor, to testify in a suit, to recover a debt due the deceased.

Courts of justice are more liberal now, than formerly, in relation to the interest which will disqualify a witness; but the rule has never been so far relaxed, as to permit one, directly interested in the event of the suit, to be a witness. If the testimony of the witness, will be to create or increase a fund, in which he is entitled to participate, or to prevent its diminution, he is incompetent. It is very clear, that such is the case here. If the partnership debts are not paid, then the estate of the deceased partner, may be called on to contribute, which the recovery of the judgment in this case would prevent, *pro tanto*. So, whether the accounts between the partners are settled or not, and whether, on settlement, the balance is in favor of, or against Sims, in either case, the recovery of this judgment would augment or diminish, as the case may be, a fund in which the witness has an interest; he is, therefore, incompetent. In the case of a creditor, called on to testify in favor of the estate indebted to him, there is no certain and direct interest, because it is contingent, whether he may ever be able to obtain his claim out of the estate; but it is not necessary to decide this question.

The precise point was determined by Lord Ellenborough, in *Baker v. Tyrwhitt*, [4 Camp. 27] where a residuary legatee was called as a witness by the executrix, in an action to recover a debt due the estate; and although he released all claim to the debt, yet, as the costs would diminish the fund in which he was entitled to participate, he was excluded.

The case of the *Bank of the State of Alabama v. McDade*, [4 Porter, 252] cannot be distinguished in principle from this. [See also, *Stebbins v. Sackell*, 6 Conn. Rep. 262. *Owens v. Collinson*, 3 Gill and Johnson, 25.]

It is strongly put, by the counsel for the defendant in error, that, as the witness was competent when his deposition was

taken, and that if true then, it must be true now, that, therefore, it should be admitted. The rule which excludes an interested witness, is not founded on the supposition, that he may not speak the truth, but that interest exerts such an influence over the majority of mankind, as to make it unsafe to rely on evidence derived from such a source. The rule, at law, requires, that the witness should be disinterested at the time of the trial. By our law, all depositions are taken, *de bene esse*, and, therefore, though taken whilst the witness was competent, cannot be read on the trial, unless the witness, if present, could give testimony before the jury. In contemplation of law, the deposition is the witness.

The rule appears to be different in the English Chancery Courts, [2 Vernon, 699, 2 Atkins, 615.] But at law, a deposition cannot be read, if the witness became interested after it was taken, as was resolved by all the Judges, in Tilly's case, [1 Salkeld, 286. See also, 1 Strange, 101.] The same rule was laid down by the Supreme Court of Pennsylvania, in the case of Reid v. McMahon, [4 Yeate's Reports, 512.]

In this State, all depositions are taken, *de bene esse*, therefore, the right to take the deposition, and the competency of the witness, must exist at the time of the trial of the cause. Although the witness still resides more than one hundred miles from the place of trial, his deposition could not now be taken, and therefore cannot now be read.

3. Sims & Scott and Jones & Horner, were joint owners of the steamboat Warrior, the former living in Tuscaloosa, the latter in Mobile. This joint ownership did not necessarily constitute a partnership, nor subject them to the consequences attending that relation, further than for repairs done to the vessel. But they were also engaged in running the boat for freight; this was a *quasi* partnership, and rendered them liable jointly and severally, to all persons who freighted property on the boat.

Sims & Scott sold out their interest in the boat, to two persons of the name of Hammond and Donaldson, who had been, under the former ownership, captain and clerk of the boat. As joint owners of a vessel are tenants in common, there can be no doubt they had the right to do so. After the purchase by them,

Hammond & Donaldson employed the boat as a general freighter, between Tuscaloosa and Mobile, whether with the consent or knowledge of Jones & Horner, the remaining joint owners, does not appear.

On the second trip down the river, she was lost. Sims & Scott having shipped one hundred bales of cotton on her, and the precise question now is, whether Jones & Horner are liable to Sims & Scott, for the loss of the cotton, without knowledge of the sale by Sims & Scott, to Hammond & Donaldson, of their interest in the boat.

As it respects strangers, and the public in general, it has been decided by this Court, in the case of *Pitcher v. Jones, et als.* [3 Stew. & Porter, 136] that they are liable. Their liability results from the fact, that they permitted the vessel to be employed as a general freighter, and were entitled to her earnings, or to such part of them as attached on their interest in the vessel. The public have no means of knowing who the partners are, or what arrangements they may make among themselves, and it would be disastrous to the community, if the right to recover of one person, who was navigating the vessel for freight, could be defeated by some secret act of another partner, by which he withdrew from the partnership. The liability to the public does not arise from any agreement among themselves, but because *all* permit the vessel to be employed as a general freighter. Therefore, although the withdrawal of one partner, without the knowledge of the rest, would put an end to that particular partnership, it would not affect the public right to recover of those who had not withdrawn, unless, indeed, by such act, the remaining partners were disseized. Whether, in such a case, where insolvent persons had been introduced as part owners, without the knowledge of the rest, and a loss had ensued from their running the boat on joint account, the remaining partners might not call on the former, is a question not necessary to be discussed at this time.

But we are clearly of opinion, that Jones & Horner are not responsible to Sims & Scott, until they had notice, that the latter had withdrawn from the partnership. In general, it may be stated, that the death or withdrawal of one of the partners from the concern, would dissolve the partnership; and it is too

clear for argument, that the purchase of the interest of one partner in a concern, will not, *ipso facto*, make the purchaser a partner. To constitute that relation, the consent of those concerned, either express or implied, is absolutely necessary. By the purchase of the interest of Sims & Scott, therefore, Hammond & Donaldson did not become partners of Jones & Horner, even if a partnership had formerly existed between the original parties in the *boat*; but were merely tenants in common with Jones & Horner. We have seen that, on grounds of public policy, the transaction, which put an end to the former partnership, will not affect strangers, who have a right to look to those, who, in point of fact, are engaged in running the boat, and entitled to share in her earnings; but the reason of the rule fails when applied to a case like the present. The business of freighting on steam boats is one of the most hazardous kind; and it was the duty of Sims & Scott, before they shipped their property on board the boat, to enquire, whether Jones & Horner were willing to engage in partnership with the new part owners, in the business of freighting. If, in point of fact, they had no knowledge of the sale to Hammond & Donaldson, although, for the reasons given, responsible to strangers, it would be the extremity of injustice, to hold them liable to those, who, by their own act, had introduced into the ownership of the boat, persons not able to respond in damages, for any loss caused by their negligence, or want of skill. It would, in effect, be to create a new partnership, without the consent of those interested.

We are not to be understood, as saying, that express notice should have been given of the sale, to Jones & Horner, or that the plaintiff should be required to prove an express assent, on the part of Jones & Horner, to run the boat in partnership with Hammond & Donaldson. If they knew of the sale, it must be presumed, that they consented to engage in the business of freighting with the new part owners, unless they, prove an express dissent, and that Hammond & Donaldson were running the boat on their own account. The Court, therefore, erred in charging the jury, that Jones & Horner

were liable to Sims & Scott, without notice of the sale to Hammond & Donaldson.

The judgment must be reversed, and the cause remanded, for further proceedings.

CORLEY AND OTHERS v. SHROPSHIRE.

1. When an interlocutory judgment by default, has been irregularly taken in an attachment suit against non-resident defendants, if they afterwards appear and plead to issue, the irregularity will be considered as waived, and is not a sufficient reason for the reversal of a judgment obtained against them on verdict.

Writ of Error to the Circuit Court of Tallapoosa County.

SHROPSHIRE sued out an attachment against Corley and several others, describing them as non-residents. At the return term, a judgment by default was taken, and the damages ordered to be assessed by a jury at the next term. At the next succeeding term, an order of publication was taken; but publication was to be made only in the event, it should be directed by the plaintiff. At the next term afterwards, a motion was made by the defendants, to set aside the judgment by default; but the transcript states, this motion was withdrawn. At a subsequent term, the parties appeared by attorneys, the death of Tarver, one of the defendants, was suggested, and the suit abated as to him. It was then tried on several issues, and a verdict found; on which judgment was given for the plaintiff.

The defendants prosecute this writ of error, and assigned as causes for reversal of the judgment of the Circuit Court.

1. That the notice by publication, required by the statute, was not given.
2. That the judgment by default was irregular.
3. That the judgment by default was rendered after plea pleaded.

4. That the order for publication was made after the default, and was conditional.

5. That the death of Tarver was suggested, and the suit abated as to him, after the judgment by default.

6. That no writ of inquiry was issued, or notice given.

7. That the final judgment does not pursue that which was interlocutory.

HEYDENFELDT, for the plaintiff in error.

GUNN, contra.

GOLDTHWAITE, J.—The object for which a publication is directed to be made, when an attachment is sued out against non-resident defendants, is to give notice of the pendency of the suit; and it stands in the place of the service of process in ordinary cases. When the defendants appear voluntarily and contest the claim of the plaintiff, publication is then unnecessary, as its object is already attained.

The judgment by default in this case, was certainly irregular; but this irregularity was waived, as soon as the defendants appeared, and were permitted to plead to issue.

They have contested the claim of the plaintiff before a jury, and cannot now be permitted to allege, that they were not regularly in court.

The abatement of the suit as to Tarver, seems to be perfectly regular, and the suggestion was not controverted at the time.

There is no error in the record, and the judgment is affirmed.

McMAHAN & EVANS v. COLCLOUGH.

1. A judgment was rendered against W. M. and W. F. E. and a writ of *feri facias* issued thereon, against the goods &c., of W. W. M. and W. F. E. Held, that the insertion of the initial of a middle name, was not such a departure from the judgment, as to avoid the execution, and that if necessary, the judgment might be aided by the declaration, in which the defendants were described as in the execution.
2. Where it appears that the defendant confessed a judgment, but the *consideratum est per curiam* is, that the plaintiff recover of the defendants "the sum so assessed as aforesaid," &c; the term "*assessed*" will mean nothing less than "confessed."
3. Where a judgment is confessed for a *debt*, while the execution describes it as being rendered, in consequence of "the non-performance of a certain promise and assumption," the variance is immaterial.
4. The omission of the words "late of your county" after the defendant's names in an execution, though contained in the statute form, cannot be regarded as essential to its validity.
5. The statute form supposes the damages and costs, for which judgment is rendered, to be added together, and an execution to issue for the aggregate; it is however no objection to an execution, that it issue for the amounts of each separately stated.
6. It is no objection to an execution, that it was not issued by the clerk, or a *duly qualified deputy*—it may be made out and subscribed with the clerk's name, by his direction, and under his supervision, or afterwards adopted by him, though the manual labor of writing, may be performed by one merely appointed for that purpose.

THE plaintiffs in error moved the Circuit Court of Pike, to quash a writ of *feri facias*, previously issued against their property on a judgment recovered against them in that court, by the defendant. The following causes were assigned as the grounds of the motion.

1. The judgment is rendered against William McMahan and William F. Evans, while the *fi. fa.* issued against the goods and chattles, &c. of William W. McMahan and William F. Evans.

2. The judgment did not authorize the issuance of the execution; because it recites that the defendants in their proper persons, confessed a judgment for the sum of four thousand and eighty-nine dollars, and the consideration of the Court is,

“that the plaintiff aforesaid, recover of the defendants aforesaid, the sum so assessed as aforesaid, together with the costs, &c.”

3. The judgment is confessed for a debt, while the execution describes it to be rendered in consequence of the “non-performance of a certain promise and assumption.

4. The execution does not in its terms conform to the form prescribed by statute.

5. The execution was not issued either by the clerk or his legally authorized deputy.

The Circuit Court overruled the motion of the defendants below, and thereupon they prosecuted a writ of error to this Court, and here assign for error the causes there stated as the grounds of their motion.

DARGAN & BUFORD, for the plaintiff in error.

GOLDTHWAITE, for the defendant.

COLLIER, C. J.—1. The first ground on which the plaintiffs in error seek to quash the execution, is not maintainable. The insertion of the initial of a middle name for one of them, in the execution, is not such a departure from the judgment, as to avoid the process. Such an objection to an original writ, or a declaration, is not pleadable in abatement, or otherwise exceptionable. But the declaration designates the defendants to the action, by the same names that the execution does, and if it were necessary to aid the judgment in a particular, so very *unimportant*, reference might be had to the pleadings.

2. The second objection is alike untenable. The judgment though somewhat untechnical, is certainly a sufficient warrant for the issuance of an execution. It is clearly a judgment by confession, and the term “assessed,” used in the *consideratum est*, will be intended to mean nothing less than “confessed.”

3. If the third cause were well taken in point of fact, it would not avail the plaintiffs; the supposed variance between the judgment and execution is a very unessential matter of form.

4. The execution, after setting out the names of the defendants, proceeds thus “you cause to be made” &c. omitting

immediately after their names, "late of your county," which words are contained in the statute form. Again, the form prescribed, supposes the damages and costs to be added together, and the execution to issue for the aggregate sum; but in the case before us, the execution describes the respective amounts of costs and damages, and directs them to be made, &c. These variances, it is insisted, are fatal to the execution. We think otherwise. They relate merely to matters of form, without affecting the substance. It is not indispensable, (though always safest) that the statute form should be literally followed; if the substance is preserved, it is all the law requires.

5. It is conceded upon the record, that the execution, though not issued by the clerk himself, was issued by his agent, recognized as a deputy, but not qualified as such in the manner directed by law. It is not indispensable to the regularity of an execution, that it should be issued by the clerk, or a duly qualified deputy. If the clerk thinks proper, he can engage the services of an assistant to write for him; and if the execution is made out and subscribed with his name, by his direction, and under his supervision, or if made and subscribed with his name, and afterwards adopted by him, it would in point of law, be as much his act, as if the labor had been performed with his own hand. That such may have been the circumstances under which the execution issued in the present case, there is nothing in the record to disprove.

Under this view of the question, it is unnecessary to examine the statute, which prescribes the oaths to be taken by deputy clerks.

The judgment is affirmed.

McCORD v. WILLIAMS & LOVE.

1. Unliquidated damages cannot be the subject of a set off.
2. Damages resulting from the breach of a contract, are unliquidated, when there is no criterion provided by the parties, or by the law operating on the contract, by which to ascertain the amount of the damages.

Error to the Circuit Court of Lowndes.

This was an action of assumpsit commenced in the Circuit Court of Lowndes county by the plaintiff in error, against the defendants in error. The declaration is in the usual form on the common counts. Pleas, non-assumpsit, payment, set off, and former recovery. The jury found a verdict for the defendants; and certified a balance in their favor of four hundred and fifty dollars twenty-five cents, for which amount the court rendered a judgment against the plaintiff.

It appears from a bill of exceptions, that the plaintiff proved the furnishing certain corn to defendant Love's negroes, and corn and fodder to his horses, in the Summer and Fall of 1836, and in the absence of defendant. In defence, it was proved that the plaintiff, for a valuable consideration, agreed to rent the defendant, Love, eighty acres of cleared land, for his hands to make a crop on in 1836—to have cleared for him, if practicable, twenty acres, to be put in corn—that defendant Love left the State early in 1836, placing the direction of his negroes &c., under the plaintiff—that only forty acres of cleared land were assigned to Love's force—no land cleared; and all the forty acres put in cotton. It was proved that the force of defendant, Love, worked both crops in common, the crop of plaintiff, and that of Love; and it did not appear that this was from contract. The proof tended further to shew that, the crop of the plaintiff, cotton and corn in proportion to his force, was much larger than that of Love. The plaintiff objected to the admissibility of the proof of the contract as above stated, and moved the court that it be excluded; but the judge refused, the defendant seeking alone a discount or set off, for the unfair application of

his force, if any, and not seeking any thing for not clearing the twenty acres, or for not assigning more than forty acres to his hands. To this decision, the plaintiff excepted. The plaintiff then moved the court to charge the jury, that as the proof showed unliquidated damages, if any, in favor of defendant Love, it could not be made the subject of a set off in this suit; which the court refused, and charged, that if the jury believed the plaintiff had put in less crop for defendant, with a view of increasing his own, and had applied the force of Love to his, plaintiff's own crop, in an undue proportion, with a view of increasing his own product at the expense of Love, then they might take this into consideration in forming their verdict. To all which, plaintiff excepted, and now assigns for error, the matters of law, arising out of the bill of exceptions.

J. B. CLARKE, for plaintiff in error, submitted the cause without argument.

DARGAN, for defendant in error.

ORMOND, J.—The contract which is set out in the bill of exceptions, might have shown that the plaintiff could not recover, if the corn and fodder, which it is said he furnished for the use of defendant's negroes and horses, was furnished under the contract; but it is most obvious, that the defendant could not recover, in this action, damages for a breach of the contract on the part of the plaintiff. Yet this has, in effect, been done in this case by giving judgment against the plaintiff on the plea of set off. If it were admitted that the defendant could abandon that portion of the contract, by which the plaintiff agreed to clear twenty acres of land, it would be still a pure question of unliquidated damages. To show this, it is only necessary to refer to the charge of the court, which instructs the jury to enquire, whether the *plaintiff had put in less crop for defendant with a view of increasing his own, and had applied the force of Love to his, plaintiff's own crop, in an undue proportion, with a view of increasing his own product, at the expense of Love*, and that if such were the fact, they might consider it in forming their verdict. The damages resulting from the breach of a contract, are unliquidated, when there is

no criterion provided by the parties, or by the law for its ascertainment. Now, the damages which the defendant was entitled to, for a breach of this contract, depended on a great many contingencies, and facts which are to be made out by proof, which might influence and operate differently, on different minds. In a word, it was altogether uncertain, and could only be ascertained and rendered certain by the verdict of a jury, it was therefore *unliquidated*, and could not be the subject of a set off [see Dunn, use &c. v. Wheeler & McCurdy, 1 Ala. Rep. (N. S.) 645.]

The judgment must be reversed and the cause remanded.

JONES v. HART & BOSWORTH.

1. A judgment against a Garnishee, who has not answered, cannot be sustained when the record does not show, either that the Garnishee was summoned, that judgment *nisi*, was rendered against him, or a *sci. fa.* made known, nor any other proceeding equivalent to a service.

Writ of Error to the Circuit Court of Tallapoosa County.

BURFORD, for the plaintiff in error.

No counsel appeared for the defendant.

GOLDTHWAITE, J.—The proceedings in this case, as they appear in the transcript, returned with the writ of error, are exceedingly defective. The judgment is rendered against a garnishee, and there is neither summons, judgment *nisi*, *sci. fa.*, or any other matter equivalent to a service, shewn by the record. The judgment is reversed and the cause remanded.

McRAE ET AL. v. COLCLOUGH.

1. In a summary proceeding against a sheriff, for a failure to return an execution, the notice should indicate whether the judgment sought to be recovered is such as is authorised by the act of 1807, or 1819. But where the notice states that the motion will be made "for the amount of a writ of *feri facias*," &c. it sufficiently shews that the proceeding was instituted under the act of 1819.
2. A judgment may be recovered against a sheriff and his securities for the failure to return an execution, upon three days notice of the motion being given, *either* to the sheriff *or* his securities.
3. In a proceeding against a sheriff and his securities, for the failure to return an execution, it is not necessary, where the notice was directed to be executed on the sheriff alone, that it should set out the names of the securities; it is sufficient that they are entered of record when the motion is submitted.
4. It is not necessary that a notice to a sheriff, that a judgment will be moved for, &c. should be dated, especially when the coroner's return shows when it was served.
5. It is not necessary that a notice to a sheriff that a judgment will be moved for, should designate the day of the term when the motion will be made.
6. The notice to a sheriff, *or* his securities, that a judgment will be moved for, may be subscribed by the plaintiff's attorney.
7. It is no excuse for a sheriff, who has failed to return an execution, that the plaintiff did not pay, or secure, or offer to pay or secure, to him his legal fees.
8. It is no answer for a sheriff who has failed to return an execution, to allege that he had more official business than himself or his deputies could perform.
9. The act of 1807, which limits the period within which fines and forfeitures may be recovered, does not, (at least since the statute of 1832, "to limit actions against securities of officers,") apply to a proceeding against a sheriff and securities for failing to return an execution.
10. It cannot be objected to a verdict that it is too broad, if every essential matter put in issue is concluded by it.
11. In a motion against a sheriff and his securities, though the suretyship of the latter is not denied by plea, yet the fact must be shown to *the court*.
12. A sheriff charged with the failure to return an execution, cannot object that the same was irregular; the more especially if it appears upon its face to be regular, and the clerk issuing the paper recognizes it as his official act.
13. Where a notice to a sheriff describes the execution as a writ of *feri facias*, this is sufficient to indicate that it issued against the "*effects*," and not the "*person*."
14. Where a notice to the sheriff described the execution as having issued against W. M. and W. F. E. but, when produced, it appeared to have issued against W. W. M. and W. F. E. the variance was held to be immaterial.
15. The omission of the jury to take with them, from the bar, the defendant's pleas, is no objection to their verdict.

THIS was a summary proceeding in the Circuit Court of Pike, at the suit of the defendant in error, against Duncan McRae, as sheriff of Barbour, and his co-plaintiffs, (sureties in his official bond.) The notice, which was the first process in the cause, is in these words, viz:

*"The State of Alabama—Pike County—To Duncan McRae, Sheriff of the County of Barbour.—*You are hereby notified, that during the term of the Circuit Court, holden for said county of Pike, on the second Monday in March, 1840, I shall move the said Court for judgment against you, and your securities, for the faithful performance of your duties, as said sheriff, for the amount of a writ of *fiery facias*, issued from the office of the Circuit Court of said county of Pike, in favor of Richard A. Colclough, against William McMahan and William F. Evans, for the sum of four thousand and eighty-nine dollars, damages and costs. Which said writ of execution issued on the sixth day of April, 1838, and was on the nineteenth day of June, 1838, placed in your hands, then being sheriff as afore-said, to execute and return according to law—said execution being returnable to the Circuit Court of said county of Pike, to be holden on the first Monday in September, 1838—which said writ of execution you failed to return according to law.

GEO. GOLDTHWAITE, *Plff's. Att'y.*"

This notice was executed on Duncan McRae, on the 17th September, 1839, by the coroner of Barbour; and he appeared and pleaded six several pleas:

I. The writ of execution, referred to in the plea, was not issued by the clerk, who purports to have subscribed the same, or by a lawfully authorized deputy.

II. There was no failure to return the writ of execution according to law.

III. The plaintiff in the execution waived the due return thereof, and consented that the same might be returned to the first day of the court to which it was returnable, and it was so returned.

IV. The plaintiff in execution consented that the same might be returned at any convenient time during the term to which it was returnable, and it was so returned.

V. The plaintiff in execution is, and was, insolvent, during the time the same was in force, and that he did not pay, or offer to pay, or secure to the sheriff, the fees for executing it; so that the means to defray the expense for returning the execution were wholly unprovided.

VI. The defendant below was sheriff of a county, other than that from which the execution issued, and that from the press of his official business, he could not return it earlier than the first day of the term to which it was returnable, and that on that day he did return it.

To the fifth and sixth pleas the plaintiff demurred, and his demurrer was sustained. Thereupon the cause was submitted to a jury, who returned a verdict in favor of the plaintiff below, on which a judgment was rendered, which, after setting out the names of the parties thus, "Richard A. Colclough v. Duncan McRae, late sheriff of Barbour County, Thomas McLure, William Cooper, Samuel N. Brown and Francis W. Pugh, his securities," recites that the said plaintiff and said McRae came by attorney, and proceeds as follows: "And the said plaintiff having given more than three days' notice to the said McRae, that during the term of the Circuit Court to be holden for the county of Pike, in said State, on the second Monday in March, 1849, that he would move the said Court for judgment against said McRae, sheriff as aforesaid, and his securities, for the faithful performance of his duties as said sheriff, for the amount of a writ of *fieri facias*, issued from the office of the clerk of the Circuit Court of the said county of Pike, in favor of the said Richard A. Colclough, against William McMahan and William F. Evans, for the sum of four thousand and eighty-nine dollars, damages, as also costs. Which said writ of execution issued on the 6th day of April, 1838, and was on the 19th June, 1838, placed in the hands of the said McRae, who was then, and from thence until the return day of said execution, sheriff of the said county of Barbour; said execution being returnable to the Circuit Court of Pike, to be holden on the first Monday in September, 1838. Which said writ of execution the said McRae, sheriff as aforesaid, failed to return, agreeably to the mandate thereof, and according to law. And the facts in said notice being put in issue by said McRae, thereupon

came a jury, to wit, &c., who upon their oaths do say, that they find the issue in favor of said plaintiff, and the facts as above specified, in said notice, true; and it appearing, also, further, to the Court, that the said Cooper, McLure, Brown and Pugh, were, at the time of the delivery of the said execution to the said McRae, and from thence until the return day of the same, his securities for the faithful performance of his duties as sheriff, as aforesaid—it is therefore considered by the Court, that the said Colclough recover of the said McRae, sheriff as aforesaid, and the said McLure, Cooper, Brown and Pugh, his securities as aforesaid, the sum of four thousand and eighty-nine dollars, being the amount of said execution and the costs of this motion.”

In the record we find a bill of exceptions, sealed by the Judge who presided at the trial, in which it appears that sundry questions of law were raised in the Circuit Court, by the defendant, all of which were decided against him.

1st. It was objected that the writ of execution for which the sheriff of Barbour was charged with a failure to return, was not issued by the clerk, or a lawfully appointed deputy, but by one previously appointed a deputy, who had never taken the oath prescribed by the statute.

2d. That the notice did not correctly describe the execution, in setting out the names of the defendants therein and its amount, and in stating that it issued against the defendants instead of their goods and chattels, &c.

3d. It was also insisted that if the sheriff, during the time the writ of execution was in his hands, had as much official business, from the Courts of his own county, as himself and deputies could perform, and was advised by counsel that if he returned the execution to the first day of the Court to which it was returnable, that this would be a sufficient compliance with the law—and, in obedience to such advice, did so return it, then the plaintiff could not recover.

4th. After the jury had come into Court with their verdict, it was ascertained that they did not take with them the defendant, McRae's, pleas, but that they remained upon the clerk's table; thereupon it was objected by the counsel of McRae, that the verdict could not be received.

The sheriff and securities, against whom the judgment was rendered, have joined in the prosecution of a writ of error, and here assign for error—

1. That the notice is uncertain and insufficient.
2. That the judgment on demurrer is erroneous in determining the pleas to be bad, when the notice itself was defective.
3. The Court erred in rendering judgment against the securities, without either a notice to, or an appearance by them.
4. The Court erred in rendering judgment against the sheriff and his securities upon the verdict, because it was uncertain and insufficient, and does not respond to the issues.
5. The Court erred in the several decisions shown by the bill of exceptions.

DARGAN & BUFORD, for the plaintiff.

GOLDTHWAITE, for the defendant.

COLLIER, C. J.—1, 3.—In *Hill v. The State Bank*, 5 Porter's Rep. 537, it was held that in a summary proceeding against a sheriff for a failure to return an execution, the notice should indicate by its terms, whether the judgment sought to be recovered, was such as is authorized by the act of 1807, or by that of 1819. That the liability, imposed by these statutes for such a default being different, and under each highly penal, it was the duty of the plaintiff to inform the defendant under which he would proceed; and that the want of particularity in that respect was fatal to the judgment.

The notice in the present case, in stating that the motion would be made against the sheriff and his securities, "for the amount of a writ of *fieri facias*," &c., sufficiently shews, that the proceeding was instituted under the act of 1819. [Aik. Dig. 164.]

It has been repeatedly holden that the eighteenth section of the act of 1819, "to provide for the appointment of county officers, and for other purposes," subjects a sheriff and his securities to a judgment for failing to return an execution, upon three days' notice of the motion, having been given *either* to the sheriff *or* his securities. [Neale, *et al.* v. Caldwell, 3 Stewart's Rep. 134; McWhorter, *et al.* v. Marrs, Minor's Rep. 376;

Broughton, *et al.* v. The State Bank, 6 Porter's Rep. 48; Mason, *et al.* v. Parker, 1 Ala. Rep. N. S. 684.]

As the notice was not addressed to the securities, and was not to be executed upon them, it was not necessary that they should be particularized by name. This was not necessary to enable them, or the sheriff, to avail themselves of any legal defence, nor have the rights of either of them been in any manner affected by the omission. It was quite enough when the motion was submitted to the Court, to state upon the record the names of those against whom the judgment was sought.—The notice describes the execution, which it alleges not to have been returned, by stating the names of the plaintiff and defendants, its amount, and the time of its issuance and receipt, and when returnable, as well as the Court from whence it issued. This was sufficient to have enabled the sheriff to have informed his securities of the proceeding against them, and though he had executed more bonds than one, yet, as the notice alleged the time when the execution was received and should have been returned, he would have no difficulty in ascertaining which of his securities it was intended to charge.

But it was argued for the plaintiff in error, that the notice is defective because it is not dated, because it states that a motion will be made at a term of a court, and not on a particular day of that term, and because it is signed by the attorney for the plaintiff in the motion, instead of the plaintiff himself.

It is not essential to the notice that it should have been dated, as the return of the coroner sufficiently shews when it was served. There is no statute which requires the notice to designate the day of the Court on which the motion will be made, and the practice has not been uniform in this respect. In some notices a particular day has been mentioned, while in others it is stated that the motion will be made during the term.—[Broughton, *et al.* v. The State Bank, 6 Porter's Rep. 48; Hill v. The State Bank, 5 Porter's Rep. 537.] Notices at the suit of a bank, generally issue in the latter form, and have been sustained; and we can discover no sufficient reason for the application of a different rule to a case like the present.

The statute under which this proceeding is had, enacts that the person aggrieved may move against the delinquent

sheriff, "and have judgment against such sheriff and his securities in office," &c., "upon giving three days' notice of such motion, to such delinquent sheriff, or his securities in office," &c. It is not expressly said whether the notice shall be given verbally or in writing, or whether it shall emanate directly from the person aggrieved, without the intervention of an agent or attorney. As, then, the act contains no prohibitory terms, we think it competent for the plaintiff in the motion to depute an attorney to represent him, either in issuing a notice or in the subsequent proceedings of the cause.

2. By the first section of the act of 1821, "concerning writs and executions" [Aik. Dig. 279.] it is made "the duty of the Sheriffs in the several counties in this State, to return all writs and executions to the clerk's office, from which they shall issue, at least three days previous to the term of the Court to which they shall be returnable; and if any sheriff shall fail to return any writ or execution, according to the provisions of this act, he shall be liable to all the penalties, provided by the law now in force, for failing to return any writ or execution to the first day of the term of the Court to which they are returnable." This act is imperative in its terms, and it is no excuse for a failure to comply with its mandate, that the plaintiff in execution did not pay or secure, or offer to pay or secure, to the sheriff, the fees which accrued to him, for receiving and returning it. There is no law which authorized the sheriff to make such a requisition, and it would, consequently, be merely gratuitous.

It is no answer for a sheriff, who has failed to perform his duty, to allege that, he has more official business than himself or his deputies could perform. Such an excuse, if tolerated in any instance, would often be made without any just foundation. In a county, in which the duties of sheriff are so onerous, the office must be profitable, and there can be no difficulty in procuring as many competent assistants, as are necessary. The Circuit Court then, properly sustained the demurrer to the fifth and sixth pleas of the sheriff.

It was argued for the plaintiffs in error, that the act of 1807, which declares that no "person shall be prosecuted for any fine or forfeiture under a penal statute, unless the prosecution

for the same shall be instituted within twelve months from the time of incurring the fine or forfeiture aforesaid," Aik. Dig. 122. was an available bar to the proceedings against them. That as the statute of limitations need not be pleaded in a proceeding for the recovery of a penalty, the court should have visited the demurrer to the fifth and sixth pleas, upon the notice; because it shewed that the penalty had occurred more than twelve months before the same was issued. Without stopping to inquire whether the act cited, ever was applicable to a case like the present, we are sure that it is not at this day.

By the first section of the act of 1832, "to limit actions against securities of officers," it is enacted that "No action, suit or motion shall be maintained against the security or securities of any sheriff, constable, or other public officer of this State, for any misfeasance, malfeasance, or other cause whatsoever, hereafter committed, unless the same be commenced, and prosecuted within six years next after the commission of the act complained of; or if the claim be in favor of an infant, or person *non compos mentis*, or other person disabled by law from bringing suit, then within three years after such disability to sue, shall cease to exist: *provided*, that this limitation shall not be extended or applied to any action, suit, or motion, which may be maintained by law, against such officer, his executors, administrators, or heirs." The terms of this act are very broad, and extend as well to a *nonfeasance*, as to a misfeasance, or malfeasance. The *proviso* seems to indicate, that the limitation provided by the act, should not be available for the officers themselves. From this we infer, that it was not the intention of the legislature to prescribe, as to them, any limitation. It cannot be allowed, unless under the influence of express legislation, that the act in regard to fines and forfeitures, should be pleaded, otherwise the strange incongruity would follow, that the securities would be liable, five years beyond the period, when proceedings against their principal would be barred.

4. The verdict of the jury, as recited in the judgment entry, not only finds the issues in favor of the plaintiff below, but also that the facts stated in the notice are true. The jury then, respond not alone to the facts put in issue by the pleas, but

affirm the truth of others, which perhaps the state of the pleading impliedly admitted. It cannot be regarded as an objection, that their verdict is too broad, if every thing essential is concluded by it. The intendment of law is certainly in favor of it. [Tippen v. Petty, 7 Porter's Rep. 441. Mason *et. al.* v. Parker, 1 Ala. Rep. N. S. 684.]

The securities did not appear and plead to issue, so that it was not a fact triable by the jury, whether they were the securities of the sheriff; yet it was essential to a recovery, that this fact should have been shewn affirmatively. Now in a proceeding of this character, if the defendants in the motion do not make up an issue for the jury, the facts alleged by the plaintiff may be determined by the Court. Here there was no issue as to the fact of suretyship; hence it was incumbent upon the plaintiff below, to prove it to the Court. This was done; and every other material fact not submitted to the jury seems to have been thus established. McWhorter *et. al.* v. Marrs, Minor's Rep. 376.

5. A sheriff, against whom a recovery is sought for the failure to return an execution, cannot be allowed to object, that the execution was irregular. If it appears upon its face, to be regular, and the clerk issuing it, tacitly or impliedly recognizes it, it cannot be regarded as an unofficial paper. Anderson v. Cunningham, Minor's Rep. 48.

The objection that the notice did not correctly describe the execution offered in evidence, and that therefore, it should have been excluded, was not well taken. The notice designates the execution as a writ of *fieri facias*, and this is sufficient to shew that it issued against the "effects" and not the "person."

In McMahan & Evans v. Colclough, at the present term, it was held to be no objection to the execution, even on a motion to quash, that it issued against "William W. McMahan," when the judgment was against "William McMahan." Upon the same principle, the execution is admissible in evidence, under the notice, although the notice omits to state the initial of the middle name of that defendant.

We have seen that the press of official business did not constitute an available defence to the motion, by the sheriff. And

the mere omission of the jury to take with them, from the bar, the pleas on which their verdict was rendered, did not authorize the Court to reject the verdict as irregular. If the party pleading desired it, it was easy for him to have handed his pleas to the jury. Not having done so, he cannot object to their verdict for that cause.

Upon an examination of all the questions raised, we are of opinion that there is no error, and the judgment is consequently affirmed.

GOULD, EX'R. AND THE HEIRS OF HAYES v. WOMACK AND WIFE.

1. When two clauses of a deed are so inconsistent with, or repugnant to each other, that both cannot stand, the first will be enforced, and the latter ejected; but it is the duty of the Court to reconcile them, if possible.
2. At common law, the right to dower could not be waived or lost, by an agreement in lieu of dower, made previous to marriage—and as there has been no alteration of the common law, by statute, in this State, it follows, that an *ante-nuptial* agreement, entered into previous to marriage, will oppose no obstacle to the allotment of dower in the County Court.
3. Equity has jurisdiction in this State, to enforce the performance of contracts fairly entered into between parties, able to contract; but it is an appeal to the extraordinary power of the Court, and, therefore, a Court of Chancery will not lend its aid to enforce the specific performance of a contract, unless it is just and reasonable in all its parts, and founded on adequate consideration. The jurisdiction of the Court is not compulsory—the question is not what the Court must do, but what it may do, under the circumstances.
4. Notwithstanding there is no legal bar to dower, in this State, a Court of equity may enforce the specific performance of an *ante-nuptial* agreement, in lieu of dower, subject to the same rules by which it is governed in other cases of the specific performance of contracts.
5. Where an old man of fifty-six years of age, on the eve of marriage with a young woman, procured from her a relinquishment of dower in his estate, which was very large, on condition of his settling on her a life estate of small value, which she agreed to accept in lieu of dower, unless he should think proper to make an additional settlement on her at his death—before which event, which happened six years afterwards, he made his will, and gave her an annuity of fifteen hundred dollars a year during her life—gave her the use for life, of some land and slaves, and directed his executors to make annual provision for her support, up-

Gould, Executor of Hayes v. Womack and Wife.

on the acceptance of which, she was not to be entitled to the property secured to her by the ante-nuptial contract. Held—that this was not such an agreement as a Court of Chancery could be called on specifically to perform, on the ground that it was not just or reasonable—

First—Because the provision made by will, pursuant to the expectation created by the *ante-nuptial* contract, was a life estate only, which, considering the age of the dowress, was, of itself, a sufficient objection.

Second—Because, when compared with the legal dower, it was not an adequate provision, although ample for support.

Error to the Chancery Court at Eutaw.

THIS was a bill in Chancery, filed in the Chancery Court at Eutaw, by the plaintiffs in error, against the defendants.

The object of the bill was to prevent Mrs. Womack from asserting her right, at law, to dower, in the real estate, and to a distributive share of the personal property of George Hayes, her late husband, on the ground, that previous to the marriage, the parties had entered into a marriage contract, by which the intended wife relinquished all her right to dower in the real or personal estate of her intended husband, except what he might think proper to give her, in addition to the property secured to her by the *ante-nuptial* contract, which is as follows :

Articles of Marriage Contract, entered into this day, between George Hayes and Anne M. Bevil, this 24th day of December, 1832. Whereas, Anne M. Bevil relinquishes all claim or claims whatever, to any of the real or personal estate of the aforesaid George Hayes, so that the said George Hayes, can sell, or otherwise dispose of the same, without any relinquishment of dower, by the said Anne M. Bevil, nor can she have any claim or demand whatever, to any part of the said Hayes' estate, except what he may hereafter think proper to give her. But in case the said Anne M. Bevil should survive the said George Hayes, then, in that case, she is hereby secured the possession of ten negroes, worth, at this time, three hundred dollars each, and one section of land of medium quality ; four hundred dollars worth of stock, to consist of horses, cattle and hogs, at a fair valuation, and corn, and other provisions, sufficient to make a crop with, so as not to exceed three hundred dollars in valuation ;—and the above property is hereby secured to the said Anne M. Bevil, that it cannot be sold, or otherwise disposed of, by her or

any other person or persons whatsoever. Should she have a child or children at her decease, they are to have the entire property together, with its increase, free of any incumbrance. This instrument is to remain good in law and equity.

In witness whereof, we have hereunto set our hands, and seals, the day and date above written.

GEORGE HAYES, [Seal.]

ANNE M. BEVIL, [Seal.]

The parties lived together as man and wife, about six years, during which period, three children were born of the marriage.

Before his decease, Hayes executed his last will and testament, and made therein, the following provision for his wife :

“Unto my beloved wife, I give Hays’ Mount, with a section of land around it. Also, fifteen hundred dollars, to be paid annually, in quarterly payments. Also, the following house servants, viz : Eliza, Sarah and Mary Bowden, the carriage horses, and Brister, the driver. Also, Dick, the garden-er, and the household and kitchen furniture, all of which is given to her during her life.

For their maintenance, I authorize my executors to purchase annually, five hundred bushels of corn, six thousand pounds of fodder or oats, two thousand pounds of bacon, three barrels of flour, and ten gallons of wine. I also give my wife six milch cows and their calves.

I authorize my executors to build, or cause to be built, a comfortable dwelling house, twenty-five feet wide; and forty-four feet long, to be divided into equal parts, by a partition, one end of which is to be subdivided into two rooms, all of which is to be finished in a neat style, and the expenses to be defrayed out of the estate.

In consequence of my wife’s acceptance of the provisions of this, I hereby declare the marriage contract, executed upon our marriage, null and void.”

The widow dissented from the will in the County Court, and prayed her dower in the real, and her distributive share of the personal estate, to be allotted to her.

The heirs and executor of the deceased, contested the right of the widow to dower, and insisted on the *ante nuptial* con-

tract, as a bar to dower, but the County Court directed dower to be allowed. The bill prayed an injunction to the order of the County Court, and for the specific performance of the marriage contract.

The cause coming on to be heard, on bill, answer and proof, the Chancellor decreed that the bill be dismissed.

From this decree, the complainants prosecute this writ of error.

The record, in this case, is very voluminous, containing a great mass of testimony taken on both sides, to show the intention of the parties to the instrument, and for other purposes, which it is unnecessary to cite, as the opinion of the Court is founded exclusively on the law of the case.

HOPKINS & CAMPBELL, for plaintiff in error, cited—1 Madd. Ch. 355 ; Edws. Chan. Rep. 60 ; 4 Bro. C. C. 509 ; 1 Cox 20 ; 3 Conn. Rep. (N. S.) 81 ; 5th Vesey, jr. 545 ; 2 Page, 559 ; 1 Madd. Chan. 609 ; 2 Roper's Legacy, 378 ; 1 Eng. Ch. R. 402 ; 6 *ibid.* 60 ; 3 Hen. & Men. 400 ; 1 Vernon, 296 ; 1 Atkins, 447 ; 2 Vernon, 724 ; Sug. Ven. 119 ; 1 Bro. C. C. 92, 308 ; 2 *ibid.* 52, 219 ; 3 Cowen, 505 ; 3 Vesey, 153 ; 2 Atkins, 33, 254, 98 ; Gresley's Eq. Ev. 204 ; 1 Johns. C. Rep. 342, 428, 859 ; 6 *ibid.* 111 ; Fon. Eq. 169 ; Gressly Eq. Ev. 349.

THORNTON & MURPHY, *contra*, cited—Lamb on Dower, 538 ; Bac. Ab. Title Jointure ; Clancy on Rights, 205, 206, 207, 208, 223, 229 ; Reeves' Dom. Rel. 414 ; 2 Powell on Con. 5, 242 ; 6 John. Chan. R. 111 ; 3 Cowen, 445 ; New. on Con. 223, 4 ; 2 Atkins, 133 ; 1 Madd. 405 ; 2 Cox, 363 ; 1 Dess. 250 ; Gresley's Eq. Ev. 207 ; 2 H. & M. 618 ; 3 Rand. 537 ; 6 Mun. 439 ; 1 Con. 402 ; 6 Johns. 222 ; 2 Mumford, 187 ; 1 Vesey & Beame, 524.

ORMOND, J.—It is contended by the learned counsel for the defendants in error, that the ante-nuptial agreement itself, shows, that it was not contemplated, by the parties to it, that it should extinguish the claim to dower, but that its object was to enable the husband to alien his land during the coverture, and bar the right of the wife to dower, in the land thus sold, without her consent and relinquishment as required by the statute.

It must be confessed, that the instrument is exceedingly artificial, and that some difficulty arises in expounding it. It is styled, "articles of marriage contract," and stipulates, that "whereas, Anne M. Bevil, relinquishes all claim whatever, to any of the real and personal estate of the aforesaid George Hayes, so that the said George Hayes can *sell or dispose of the same, without* any relinquishment of dower by the said Anne M. Bevil. If the instrument had stopped here, it is very clear, that it could not be inferred to have been the intention of the parties, to bar the right of the widow to dower, after the death of the husband, but it proceeds in the same sentence to provide, "nor can she have any claim or demand whatever, to any part of the said Hayes' estate, except what he may think proper to give her hereafter; but, in case the said Anne M. Bevil should survive the said George Hayes, then, in that case, she is hereby secured the possession of ten negroes," &c.

It is an established rule of construction, that if two clauses of a deed are so repugnant to each other, that they cannot be reconciled, or stand together, that the first must be adopted, and the latter rejected, [Shep. Touch. 88.] The effect ascribed to the relinquishment, by the first clause of the instrument, is that the husband would be thereby enabled to sell and convey his land, during the coverture, without the necessity of obtaining his wife's relinquishment of dower. Now the effect, here supposed to be the result of the contemplated relinquishment, cannot be said to be repugnant to, or inconsistent with the succeeding part of the clause, which, according to its plain import, was intended to prevent the assertion of any right to dower, in lieu of which, the slaves and other property described, was secured to the wife, to which is added the expressive clause "*except what he may think proper to give her hereafter.*" It is not inconsistent with, or repugnant to the latter because it merely declares, what the law would declare, if the first part of the clause were entirely omitted. It can admit of no controversy, that, if it is conceded that the right to claim dower after the decease of her husband, was by that instrument relinquished, it must as an incident have rendered a relinquishment of dower by the wife, on all sales of land made by the husband, during coverture unnecessary. It was then

entirely unnecessary, but not inconsistent with, or repugnant to, the latter part of the clause. Whether its tendency may not have been to mislead one of the parties, is not a question we are now to consider. Gathering, as we must do, the intention of the parties, from the paper itself, considered as a whole, whatever may have been the effect ascribed to it in the minds of the parties, we must say, that its legal effect is, that the parties intended it should bar the widow of her dower. At common law, by the marriage, the wife acquired a right to be endowed of one third part of her husband's lands. This right she could not alien or dispose of, in consequence of two maxims of the common law—First, that no right can be barred before it accrues. Second, that no right or title to an estate of freehold, can be barred by a collateral satisfaction. It is said, that one of the reasons, why estates were conveyed to feoffees to uses, was that a widow was not dowable of a *use*. It therefore became common, for the friends of the wife, to procure the husband to take an estate from his feoffees and to settle it to himself, and his wife, for their lives in joint tenancy, lest the wife should be unprovided for, at the death of the husband.

The statute of 27th, Henry 8, commonly called the statute of uses, declared that, all those who had the *use* of lands, should be deemed to have the legal seizin and possession, the effect of which would have been, that all women then married, would have been dowable in all lands held to the use of their husbands, and might also claim any estate settled on her in jointure. To prevent this result it was provided by the 10th chapter of that act, that a jointure possessing certain qualities required by the act should be a bar to her claim of dower.

This portion of the statute of uses, has never been incorporated into our statute law, and by consequence, the question in this State stands as it did at common law.

The counsel for the defendants in error, insist that the equitable jurisdiction of the English chancery, is founded on the statute of the 27th, Henry 8, and that it only acts by analogy to it. That in this State, where there can be no such thing as a legal bar to dower, equity can have no jurisdiction, further than to compel an election.

It is stated by a very respectable writer, Roper on Property, that the jurisdiction of Courts of equity, in these matters, existed before the passage of the 27th Henry, 8th, upon the principle of enforcing agreements entered into between individuals. Whether it be true, as stated by counsel, that no case can be found anterior to the passage of the statute of uses, in which the court exercised this power, it is certain, that the jurisdiction of the Court of Chancery to enforce contracts entered into previous to marriage, and to compel an execution in lieu of dower, has been long established.

It is a matter of some difficulty to trace, precisely, the grounds of the jurisdiction of the Court of Chancery in these cases. In many of them, the decision cannot be supported on any other grounds, than by analogy to the provisions of the statute of Henry 8th. As, for example, where effect is given to a provision made by the husband in lieu of dower, to which the intended wife is not a party, and where the intended wife was an infant, when the contract was entered into. [See *Drury v. Drury*, 1 Eden. 59, and *Estcourt v. Estcourt*, 1 Cox. 20.] In cases of this description, it is clear, that the jurisdiction of the Court, was founded on the statute, which permitted the wife to be barred of her dower at law, by a provision, made by the husband, before marriage, to which she was not a party; and even if she were an infant, the Court holding, that where the law had been substantially complied with, they would dispense with its forms; and thus a system grew up of equitable bars to dower. It appears however, that in many cases, this distinction was lost sight of, and that the Court acted in virtue of its power, to enforce the performance of contracts, without any regard to the legal rights of the widow. Thus in *Caruthers v. Caruthers*, 4 Bro. C. C. 500, the master of the Rolls, although he admits that an infant is not bound by an uncertain or precarious provision, says "I do not say that if she had been an adult, she might not have bound herself; she might have taken a provision out of the personal estate, or she might have taken even a chance in satisfaction for her dower, acting with her eyes open; but an infant is not bound by a precarious interest."

But in a recent case, this is denied to be law in a very able opinion of Sir Anthony Hart, the Irish Chancellor, who says "although Lord Redesdale in *Birmingham v. Kirnan*, 2 Schoales & Lefroy, is made to say that he knew no distinction between the right to dower, and other rights, the law has certainly seen and marked very clearly, such a distinction. I know no jurisdiction, which a court of equity has to say, you may do that, which the law says you shall not do. The law says the intended wife shall not by contract, bar her dower, except certain requisites are complied with. Equity may dispense with the form of these requisites, but not with the substantial matter, which they all tend to, that is a solid provision for the widow, such as was agreed on by the contracting parties. A court of equity deals with an equitable instrument, precisely as a Court of law would, with a legal one. It preserves the analogy, and by no means looks at this duty as an agreement independent of that analogy. I repeat, there is no equity to enforce this agreement, except as an adoption of an equitable provision in analogy to jointure under the statute; and this Court would abandon its best rule, if when the object of that statute, is clear to bar dower only on a provision being made certain, with certain forms, it went beyond this, that is to say, when it finds a contract, which purports to provide a certain maintenance, to do more than effectuate that arrangement, without regard to the appendages, if it attain the primary object; but always contemplating some provision, certain as a condition of its interference." *Power v. Shiel*. 1 Molloy, 296. The Chancellor held, that the marriage contract was no bar, as the fund provided by it was unproductive.

It appears therefore, that even in England at this day, the Courts of Chancery merely profess to give effect to marriage contracts, when the substantial requisites of the statute have been complied with—and its forms only are wanting. But it will not follow, that a Court of Chancery, even without the aid of such a statute, cannot enforce a specific performance of a contract of this description, by virtue of its general power over the subject. No reason is perceived, why this class of contracts should form an exception to the general rule, but many and cogent arguments may be adduced to the contrary.

In the case of ordinary contracts, the refusal of the Court to enforce a specific performance, merely deprives one of the parties of a bargain, and leaves them as they were before, and at liberty to seek redress at law, for any injury either may have sustained. But after marriage, the parties cannot be placed in the same condition, they formerly occupied. Nor could adequate redress be always had at law. It follows therefore, that equity has jurisdiction to enforce the specific performance of an *ante-nuptial* agreement, fairly entered into between parties able to contract, in the same manner, and subject to the same restrictions, as other cases of the specific performance of contracts.

The question then is, has the complainant made out such a case as will call into active exercise, the extraordinary power of this Court, to enforce a specific performance. The jurisdiction of the Court is not compulsory, but discretionary. The question is not, what the Court must do, but what it may do, under the circumstances, 12 Vesey, Jr. 331. So in the case of *Seymour v. Delancey*, 6 John's, C. 222, Chancellor Kent says, "It is a settled principle, that a specific performance of a contract of sale, is not a matter of course, but rests entirely in the discretion of the Court, upon a view of all the circumstances." The same effect, are the opinions of Lord Somers, Lord Maclesfield, and other eminent English chancellors.

The case just referred to, of *Seymour v. Delancey*, underwent an examination in the Court of Errors of New York, and the question, whether the Court had a discretion to order or refuse a specific performance of executory contracts, was considered by C. J. Savage, who examines at great length, and with much ability, the leading English and American cases on this subject, and thus sums up the result of his examination. "On the whole, therefore, I am of opinion, that on the question of decreeing specific performance of executory contracts, the Court of Chancery must exercise its discretion; not an arbitrary, but a sound judicial discretion. If the contract be free from objection, it is the duty of the Court to decree performance. But if there are circumstances of unfairness, though not amounting to fraud or oppression, or if the inadequacy of consideration, be so great, as to render the bargain hard and unconscionable

on either ground, the Court may refuse its aid, and leave the parties to contest their rights in a Court of law. 3 Cowen's Rep. 521.

In King and others v. Hamilton and others, 4 Peter's Rep. 328, the Court hold this language: "It is a settled principle therefore, to allow a defendant to a bill for a specific performance of a contract, to show that it is unreasonable or unconscientious, or founded in fraud or mistake, or other circumstances, leading satisfactorily to the conclusion, that granting the prayer of the bill, would be inequitable and unjust."

Such is the doctrine, it may be added in the States of South Carolina, Virginia, and Connecticut, as shown by the authorities referred to by the counsel for the defendant, but to cite them all would swell this opinion beyond the limits I have assigned to it, and would be an unnecessary repetition. They may be all thus summoned up, and it accords with the opinion of this Court—that a Court of Equity will not lend its aid to enforce a specific performance of an executory contract, unless it is just, reasonable in all its parts, and founded on adequate consideration.

This is doubtless the general rule applicable to the class of contracts of which we have been speaking, when sought to be enforced in chancery—as to the particular kind of contracts now under discussion, it has already been shown, that in those countries where the widow is authorized to bar her right to dower at law, by an *ante-nuptial* contract, Courts of Chancery, which look at the substance of things, and disregard form, will decree a specific performance, in cases where the provision is inadequate, if it does not entirely fail, because such was the intention of the parties,—an intention which the law authorized to be carried into execution, which the parties intended to execute, and failed to accomplish, by the omission of some form. These cases therefore are in those courts excepted from at least one of the rules, which enter into the consideration of other contracts, coming under the same general head. In this particular class of cases, mere inadequacy of consideration, though such a prominent objection, in other cases of executory contracts sought to be enforced, is not of itself sufficient to prevent its execution by the Court. But even in these Courts,

where a case arises in which the party could not bind him or herself under the statute, the Courts apply the same rules which govern its action in ordinary cases. This principle is asserted by the Chancellor in the case of *McCarter v. Teller and wife*, 2 Paige, 511. 4 Bro. C. C. 513. 1 Maddox, Rep. 613.

The facts of this case, are that a man of large property, considerably advanced in life, being fifty-six years of age, on the eve of marriage with a young lady just arrived at the age of legal discretion, obtained from her the execution of the *ante-nuptial* agreement, now sought to be enforced, by which she relinquished all claims whatsoever, to the real and personal estate of her intended husband, "except what he may think proper to give her hereafter; but in case she survived him, she was to receive ten negroes, worth three hundred dollars each, one section of land, of medium quality, four hundred dollars worth of stock and corn, and other provisions, not to exceed three hundred dollars in value. This property she was to enjoy during her life, and at her decease, it was to go to her children. The parties lived together as man and wife, about six years, during which time, three children were born of the marriage, and the husband, being sick and about to die, made his last will and testament, by which he bequeathed to his wife a section of land, and fifteen hundred dollars per annum, during her natural life; also, the use, during her life, of four slaves—the carriage and horses, and household and kitchen furniture—also, five hundred bushels of corn, two thousand pounds of bacon, six thousand pounds of fodder, three barrels of flour, and ten gallons of wine, which the executors of the will were directed to purchase annually, and six milch cows and calves. He also authorized his executors to build a comfortable house which he particularly describes, but does not say for whose use it is intended. The concluding clause of the will is, "In consideration of my wife's acceptance of the provisions of the will, I hereby declare the marriage contract, executed before my marriage, null and void." This last provision refers to an acknowledgement made by the wife, of the same date with the will, and is in these words: "Know all men by these presents, that I do hereby accept of the provisions of the last will

and testament of my husband, made and executed by him, this sixth day of July, 1838."

Signed,

ANNE HAYS, [Seal.]

Considering, as we must do, the *ante-nuptial* agreement in this case, as a mere contract, entered into by parties able to contract, has it those qualities, which, under all the circumstances of the case, entitle the heirs to demand of this Court, its specific performance, against the legal claim of the widow to dower? Is it fair, just and equal in all its parts, and founded upon adequate consideration? If, upon examination, it be found wanting in any of these qualities, this Court cannot be called on to execute it, but will leave the parties where the law has placed them.

Dower is a right highly favored at the common law, and justly so, to guard the weaker sex from imposition, to provide a fund for their maintenance, when they can no longer lean on the protecting arm which had sustained and supported them. It is a principle which ought to be cherished. To ascertain then, what is just, fair and reasonable, as a provision, we must enquire what the law would allow the wife in this case, and see by the comparison of that, with the fund provided by the *ante-nuptial* contract, whether it is a proper one, under all the circumstances of the case. For, if it can be shewn that it is grossly inadequate, when contrasted with the husband's estate, making allowance for the claims which his children have on his bounty, this Court cannot, on the principles which govern it in decreeing a specific performance, be called on to execute the contract.

The estate of the deceased is estimated, in some part of the case, at eight hundred thousand dollars. This is, doubtless, an exaggerated estimate. He possessed, however, one hundred and eighty slaves, and an immense landed estate, the great bulk of his fortune being in land. Of this large estate, the widow is, by law, entitled to the absolute property in one-fourth part of the slaves, and other personal property, and to one-third part of the lands, during her life. The provision then, made for her by the *ante-nuptial* agreement, when contrasted with her legal rights, is so utterly disproportionate, as to be well considered, as grossly inadequate, unreasonable and unjust.

And we know of no principle, which would authorize this Court to say to her, that she shall not avail herself of that provision which the law has secured to her, and that she shall take the mere pittance secured by the *ante-nuptial* agreement.

It is perfectly well settled, that a Court of Chancery will not decree a specific performance, where there is a great inadequacy of value, on the ground, that they will not enforce hard or unconscionable bargains. This is an ancient, and well established doctrine of the Court of Chancery, as is shewn with great clearness and precision, by Chancellor Kent, in the case already referred to, of *Seymour v. Delancey*, 6 Johns. C. 222, in which he reviews all the English authorities. The same case was afterwards carried to the Court of Errors, and again underwent a thorough examination, and the principle was established beyond controversy. [See also, 1 Maddox C. Rep. 9; 2 Atkins, 385; 10 Vesey, jr. 292.] So far, therefore, as the ante-nuptial contract can affect this question, it is clear, beyond all doubt, that, according to the well established principles by which Courts of Chancery are governed in cases like the present, it should not interfere.

It appears, however, that the husband did not propose to his intended wife, to receive the small amount of property mentioned in the marriage contract, in lieu of dower in his large estate, but held out the idea that he would make a further provision for her. By the terms of the *ante nuptial agreement*, the intended wife, in consideration of the slaves and other property, agreed to be secured to her, relinquishes all right to his estate, "*except what he may think proper to give her hereafter.*" It is, therefore, proper to consider whether the provision made in the will, pursuant to the expectation thus created, is fair and reasonable. The provision thus made, consists of an annuity of fifteen hundred dollars a year, the use of five slaves, besides an annual provision which the executors are required to procure for the support of her family, which appears to be ample for that purpose. The executors were also required to build a house of a particular description, which it may be conjectured was for the use of the wife, but it is not so stated in the will. It would be going great length, in the construction

of the will, to say that such was the intention. It belongs to the class of patent ambiguities, and therefore not open to proof. He also gave her the use, during her life, of a section of land.

As the provision made in the will is ample for the support of the wife, it becomes necessary to settle the meaning of the term *adequate*, when applied to such a case as the present. It is very evident that, when this term is applied to a provision in lieu of dower, it must be compared with, and have reference to, the value of the legal dower, or it is without any definite meaning. One hundred dollars might be more than the value of the legal dower, and yet be inadequate for support. So on the other hand, ten thousand dollars might be ample for support, and yet greatly inferior in value to the legal dower. It follows, therefore, that the only test is to institute a comparison between the provision made in the will, and the actual value of her dower at law; and it is by precisely the same process that a knowledge of the fact of inadequacy in any contract, can be ascertained.

The value of the provision made for the wife, by the will, is difficult of ascertainment, from its being a mere life estate.—It is not, probably, more than equal in value to one third part of what she would be entitled to by law; and the disproportion may be, and probably is, much greater than here supposed.—Without going further into particulars, it is sufficient to say, that the provision made by the will, is grossly disproportionate to the value of the legal dower.

The mere fact that the provision is an annuity, would, of itself, be sufficient to prevent this Court from compelling the widow to accept it in lieu of dower. The law gives her an absolute estate in her portion of the slaves and other personal property of the husband, and it would be doing her great injustice, to require her to accept, in lieu of it, a mere annuity.—In the State of New York, where the 10 c. of the 27th Henry 8, was enacted verbatim, and where, by consequence, a jointure properly made, previous to marriage, was a legal bar, even in the case of an infant, yet, if it was necessary to resort to a Court of Chancery, the Court would not enforce it “unless the provision was as certain and as beneficial to the infant, as that required in a legal jointure to create a bar. It must be a reason-

able and competent livelihood for the wife, in reference to the circumstances and situation in life of the parties, the value of the husband's estate, and the extent of the wife's portion, received with her on the marriage." [McCarter v. Teller, 2 Page Chan. Rep. 511.] And in that case, where an annuity was set up as an equitable bar to dower, it was considered a fatal objection to it that it was limited to the widowhood of the wife. In that case, as in this, the annuity was by will, and intended to be in lieu of property, secured by articles previous to marriage. In Williams v. Chitty, 3 Vesey Jr. 545, Lord Thurlow held that a settlement to bind an infant, must be fair and reasonable; and in Caruthers v. Caruthers, 4 Bro. C. C. 513, the Master of the Rolls, after an elaborate judgment, expressed the same opinion. The result of these cases is, that even where dower may be barred at law, when in the case of infants, the Court of Chancery is called on to enforce a marriage contract, it will not interfere, unless the contract is just, fair and reasonable, on the ground that they are not bound at law.

This being the case, where dower may be barred at law, by an *ante nuptial* contract, and where, by analogy to the statute, a Court of Chancery, disregarding form, and looking only to substance, will enforce any contract which an adult female may make prior to marriage, with the intention of barring her dower, no matter how inferior in value to her dower; yet, in this State, where there can be no legal bar to dower, and where an *ante nuptial* agreement can only be enforced in Chancery, as any other contract which the Court may be called on specifically to perform, its aid cannot be had unless the contract is fair, just and reasonable, in all its parts, even if there be neither fraud nor misrepresentation, mistake or surprize, or if the inadequacy be not so great as to be of itself evidence of fraud.

Indeed, it may well be doubted, whether this is not carrying the jurisdiction of the Court to the very verge of propriety, as it is, in effect, saying to a party, you shall do that which the law says shall not be done, and can only be defended on the ground of the peculiarity of the marriage relation, the most important of all contracts, and because the parties cannot be placed in *statu quo*.

It appears, therefore, from the examination here made, that the property secured by the *ante nuptial* contract is grossly inadequate, when compared with the value of the dower; that the provision made by the will, though less objectionable on this score, is still too disproportionate to the value of the dower to entitle it to the aid of this Court. The interpretation of that part of the *ante nuptial* contract which contemplated a further provision by the husband, must be a fair and reasonable provision, in reference to his circumstances and situation in life, and the value of his estate; and as the provision made does not answer this description, the widow cannot be compelled to receive it in lieu of dower.

We do not wish to be understood as saying that a provision to bar dower, where there is neither mistake, surprize or fraud, must be as valuable as the dower; but that it must not be greatly deficient in value; nor would this Court be disposed to institute a nice comparison, especially in a case where, though not fully equal in value to the dower, the amount secured in lieu of it was a competent livelihood. But, in this case, not only is the deficiency in actual value very great, but the character of the estate, a mere life interest, considering the age of the doweress, would, of itself, be sufficient to cause its rejection.

We have avoided the consideration of many interesting questions, argued with great ingenuity and learning, on both sides, and presented on the record. As to the effect of the answer in relation to the intention of the parties to the instrument—the effect of the admission of the husband after the marriage—and of the right to contradict or explain the instrument without alledging fraud—not merely because those questions are, some of them, difficult and embarrassing, but principally because we desired to present this interesting and delicate question, in a plain and intelligible manner, unclogged with the consideration of circumstances which might, if they had been discussed, have been hereafter supposed to enter into the consideration of the question, and thus impair its value as a judicial precedent.

It was insisted in argument, by the counsel for the plaintiff in error, that the defendants in error were concluded by an ad-

mission, made on the application for the allotment of dower, in the County Court, from now disputing the validity and efficacy of the *ante nuptial* agreement, as an equitable bar to dower.

The supposed admission consists in the demurrer of the widow, in the County Court, to the *ante nuptial* agreement, which was set up by the executor and heirs of the deceased, as a bar to the allotment of dower in the County Court. When a fact is pleaded in bar of a right asserted by suit, if the fact exists, there is nothing left to the party against whom it is offered as a bar, but to question its legal validity as a bar. It is certainly true, that an admission made by either of the parties, in the pleadings, cannot be contradicted by proof. But no admission is made here, but that the fact stated is true. Its validity as a bar, in the County Court is denied—is that equivalent to an admission that it would be operative in any other Court? If so, a plaintiff would be placed in the singular predicament that, where a fact which he cannot deny is pleaded as a bar, as he cannot take issue in fact; so neither can he defend himself by an issue in law, without admitting the legal validity of such a fact, in some suit to be afterwards instituted, in some other tribunal. The supposition that a denial that a fact pleaded in bar of one suit, is valid, is an admission of its validity in another suit, does not comport very well with the severe logic which is supposed to pervade the science of pleading. The *ante nuptial* agreement could not, under any circumstances, have been a bar to the action of the County Court, which must proceed according to the rules of law, and has no equitable jurisdiction; and this was all which was asserted by the demurrer to the plea of the heirs, in the County Court.

It remains but to add, that the decree of the Chancellor is affirmed.

STONE et al. v. BIBB.

1. The plaintiff of record cannot be examined as a witness to support the action, although he is shewn to be a mere trustee, by other testimony; nor can he be made competent by the deposit of a sum of money sufficient to cover the costs of the suit, although he at the same time releases all his interest in the sum to be recovered, to the person beneficially entitled to it.

Writ of Error to the Circuit Court of Montgomery County.

ACTION of assumpsit on a note executed by the plaintiffs in error, to Bibb, the defendant. In the progress of the trial, evidence was given, tending to show some defect in the consideration of the note, which was given for the purchase of a tract of land, sold by Bibb, by virtue of a deed of trust, executed by one Vincent, to secure certain of his creditors. The creditors wished to introduce Bibb as a witness, to disprove some of the matters shown in defence, and, to render him competent, they deposited in Court a sufficient sum to cover the costs which had accrued, or might accrue, in the suit. Bibb at the same time relinquished to his *cestuis que trust*, all his right to commissions, and then deposing on the *voire dire*, that he had no interest in the suit, was permitted to be sworn as a witness.

The defendants excepted, and now seek to reverse the judgment rendered against them, on the ground that this witness was improperly admitted to testify.

HILLIARD, for the plaintiffs in error, and DARGAN, for the defendant, submitted this case on an imperfect transcript, which they agreed should be considered as presenting the facts before stated.

GOLDTHWAITE, J.—This is the first time, in this State, within our knowledge, that the plaintiff on the record, has been allowed to change his position, and, instead of a party, become a witness, to support his own suit, without being called on by, and against the consent of, his adversaries. We are not unaware that some decisions of the Courts of Pennsylvania, and of the Circuit Court of the United States, setting in that State,

have sanctioned this practice. Innovations have also been made in the English Courts, and in most of the Courts of our sister States, on the admitted rule of the Common Law, which in its strictness, excluded the parties on the record from ever giving evidence. The exceptions to the rule of the Common Law, in most cases, have established themselves by their manifest necessity in some, and by their good sense in most, of the cases. They are mostly all collected by Judge Cowen and Mr. Hill, in their notes to Phillips' Evidence, pp. 134, 1148, but are entirely too numerous to receive an examination within the compass properly allowable to an opinion. It is not very important, so far as the decision of this case is concerned, to inquire whether the rule of the Common Law has its origin in policy, or whether it depends entirely on the question of interest. If in the former, it has continued too long to be abrogated by mere judicial decision; and if on the latter, as we incline to believe, it is difficult to conceive in what manner, by his own act, the plaintiff, or by the acts of others, can divest himself of the interest which is inseparably attached, as it seems to us, to his condition as an actual party to the record. Has he the legal right to force his adversary to resort to the custodian of the money, when he, or another for him, deposits the estimated amount of costs? Is it not also worthy of consideration, whether there is not a variety of contingent interests and liabilities which cannot be anticipated by any foresight, nor obviated by any mode except the consent of the other party?

The present condition of this case illustrates one of these contingencies. It cannot be supposed that a deposit made by those interested in the deed of trust, could be reached to satisfy the costs of this suit in error. So likewise if the defeated party, defeated too by the evidence given by his adversary, should afterwards make out a case for equitable relief, it is supposed that the plaintiff, where he is not merely nominal, must be liable for costs.

It must be observed that this is not the case of a mere nominal plaintiff, where a name is used under the statute; therefore it is needless to distinguish this from such a case.

It is unnecessary further to examine this case, as we are satisfied that whenever the parties on the record, are liable for

either direct or consequential costs, then none but the adverse parties can extinguish the interest, and, consequently, that no one in the condition of this plaintiff, can be examined as a witness, without the consent of those who are authorized to insist on his retaining his liability.

Let the judgment be reversed and the cause remanded.

THE STATE v. HUGHES.

1. The 10 sec. of the 1 Art. of the Constitution, guaranties to one indicted for a crime, the right to be present in Court, that he may discuss questions of law and fact, which may arise either preparatory to, or pending the trial, and that he may point out objections to the action of the jury, or other proceedings in the cause.
2. One tried for a crime, has a right to be present when the jury return their verdict against him, that he may examine them by the poll, to ascertain if they assent to his conviction.
3. The reversal of a judgment of the Circuit Court, in a criminal case, upon points referred as novel and difficult, does not make it necessary that the accused should be indicted anew, when the cause is sent back for another trial, unless the indictment was adjudged insufficient.
4. The statute of 1826, which provides for the holding of a special term, "devoted exclusively to the civil and chancery docket," does not repeal the acts of 1807 and 1819, (as consolidated,) which authorise a special session of a Circuit Court for the trial of a criminal cause.
5. Where a verdict of "guilty," in a case punishable capitally, was received by the Court, in the absence of the accused—held, that although the Court erred in thus receiving the verdict, yet the accused was not entitled to his discharge, but should be tried *de novo*.

THE prisoner being indicted in the Circuit Court of Dallas, for the crime of murder, pleaded, 1. Not Guilty. 2. *Autre fois acquit*; and, being put upon his trial, a verdict of "guilty in manner and form as charged in the indictment," was returned by the jury; whereupon judgment was, in due form, rendered against him.

After the jury had returned their verdict, the prisoner moved in arrest of judgment, and assigned sundry causes. A copy of which, together with a decision thereupon, and a statement of facts by the Court, is as follows :

“ Came Gayle & Saffold, the counsel of the prisoner, Hughes, and moved in arrest of judgment on the following grounds, to wit :

1st. The verdict was given in the absence of the prisoner.

2d. The Court erred in charging the jury, that an acquittal could only be, by a jury, under defendant's plea of *autre fois acquit*.

3d. That the reversal, by the Supreme Court, was an acquittal of Hughes on the old indictment, and he could not be tried on it again.

4th. That the appointment of the special court for the trial of Hughes, was without the authority of law, being without his consent or application.

And the matter involved in said motion, being considered by the Court, the motion is overruled. The facts were, that the prisoner was not in Court when the verdict was delivered, but his counsel were, and no request made that the prisoner should be.

“ The proof submitted under the plea of *autre fois acquit*, was the certificate of reversal in the Supreme Court, and a copy of the opinion of the Court in the case—this was all the proof. Upon this state of proof the Court charged the jury, that it was insufficient to sustain the plea of *autre fois acquit*. But because the points raised under the motion in arrest of judgment are deemed novel and difficult, the same are reserved for the consideration of the Supreme Court, whether the motion should have been overruled or not.”

ATTORNEY GENERAL, for the State.

G. W. GAYLE, for the prisoner.

COLLIER, C. J.—1. The 10 section of 1 Article of the Constitution declares, that “ In all criminal prosecutions the accused has a right to be heard by himself and counsel,” &c. Again, “ and in all prosecutions by indictment or information, a spee-

dy public trial, by an impartial jury of the county, or district, in which the offence shall have been committed; he shall not be compelled to give evidence against himself, nor shall he be deprived of his life, liberty or property, but by due course of law."

This constitutional provision guaranties to the accused the right, not only to discuss questions of law and fact, which may arise, either preparatory to, or pending the trial before the jury, but to point out and argue objections to the action of the jury, or other proceedings in the cause. That he may avail himself of this privilege, the opportunity must be afforded him of coming into Court and being heard, before he is foreclosed of any legal exception. If a different course is pursued, and a sentence pronounced against him extending to life, liberty or property, he cannot be said to have been convicted "by due course of law."

But we need not consider the first cause moved in arrest of judgment, in reference to the provision of our Constitution, for so far as it concerns this question, the constitutional declaration is affirmatory of the common law. Mr. Justice Blackstone, in treating of a trial in a criminal case, says, "When the evidence on both sides is closed, and indeed, when any evidence hath been given, the jury cannot be discharged, (unless in cases of evident necessity,) till they have given in their verdict; but are to consider of it, deliver it in, with the same forms as upon civil causes; only they cannot, in a criminal case, which touches life or member, give a *privy* verdict."

The precise question we are considering, came before the Supreme Court of New York, in *The People v. Perkins*, 1 Wend. Rep. 91. In that case the prisoner had been indicted for a forgery. When the cause was submitted to a jury he was committed to jail, and on the coming in of the jury, their verdict was received without the prisoner being brought into court. On being brought up to receive sentence, he objected that he was not present when the verdict was received; and the Court of Sessions, before which he had been tried, suspended judgment, until the advice of the Supreme Court was obtained.

The Court said that the verdict was irregular, and, though many of the ancient forms on trials are now dispensed with, the prisoner should have been present on receiving the verdict, that he might have availed himself of the right of polling the jury. And a new trial was consequently granted.

In that case it was held to be the clear right of the prisoner to poll the jury; while in the other, it is considered as depending for its exercise upon the discretion of the Court. [Commonwealth v. Roby, 12 Pick. Rep. 496, 513; Fellow's case, 5 Greenl. Rep. 333.] But it is exercised, we believe, in all criminal courts in the United States, whether as an acknowledged right or granted *ex gratia curiæ*. [Fox v. Smith, 3 Cow. Re. 23; Goodwin's trial, 18 John. Rep. 188; The State v. Harden, 1 Bailey's Rep. 3.] Lord Hale says, [2 Hale's P. C. 299,] that when the jury respond to the general inquiry made of them, by saying they have agreed, the Court may examine them by the *poll*; and such has been understood to be the law in this State, since the organization of the government. This brings us to the conclusion, that, by receiving the verdict of the jury, in the absence of the prisoner, he has been deprived of a legal right; and its reception was consequently irregular.

2, 3.—The reversal of the conviction of the prisoner, at a previous term of this Court, was not intended to operate so as to discharge him from a further trial for the same offence. The cause was then remanded for that purpose, and it is so said in the opinion of the Court. There was no necessity for preferring a new indictment; the one already found was unaffected by the judgment of reversal. The insertion of the words "unless in the interim he should be discharged by due course of law," after the direction that the cause be remanded for a new trial, was dictated rather by a conformity to form than any thing else; for it is difficult to conceive how the prisoner could be discharged, otherwise than by an executive pardon, until tried.

4.—By the statutes of 1807 and 1819, as consolidated, it is enacted, that "A special session of any Circuit Court may be held, by order of the Judge or Judges of the same, whenever it may be necessary, for the trial of criminal causes; and the said Judges, at their discretion shall have power, on the ap-

plication of any person charged with a criminal offence, to hold a special session, for the trial of such person; and the said Judges shall direct the sheriff of the county in which such special session shall be holden, to return thereto twenty-four persons, properly qualified, to serve as jurors; who shall be selected in the manner now prescribed by law, in such cases—any, or all, of whom failing to attend, or being challenged, or set aside, a jury of bystanders shall be empannelled for the trial of the cause.” [Aik. Dig. s. 14, p. 242.]

The prisoner was tried at a special term of the Circuit Court of Dallas, holden for the trial of criminal causes. At the preceding regular term, the presiding judge stated upon the record his entire inability, in consequence of indisposition, to proceed “with the disposition of the business on the several dockets of the Court,” and appointed a time when a special term should be holden, and made the appropriate order in regard to the drawing and summoning a jury.

It was argued for the prisoner, that the Court, at which he was tried, was irregular and unauthorised, because the act of 1826 provides, that when “the Circuit Courts should not be able to dispose of all the business depending in any of the said Courts, at their regular terms, it shall be the duty of the judge of the Circuit,” &c. to hold a special term, “devoted exclusively to the civil and chancery docket.” [Aik. Dig. s. 16, p. 242.] This statute, it is insisted, repeals the previous enactment in regard to special terms for the trial of criminal causes. We think this argument cannot be maintained. The statutes are entirely consistent with each other—they have different objects in view, and may both operate together.

Having attained the conclusion that the judgment of the Circuit Court must be reversed, we are now to inquire what further order shall be made in the cause.

In the case of the *People v. Perkins*, 1 Wend. Rep. 91, the prisoner was ordered to abide a new trial—that case, we have seen, was in all respects like the present.

In *Ned v. The State*, 7 Porter’s Rep. 187, it appeared that the jury, to which the cause of the prisoner was submitted, were discharged, by an order of Court, without a sufficient reason therefor, from rendering their verdict. That case, it is

insisted, is authority to shew that the prisoner, in the present case, should be discharged. The cases, it is conceived, are not analogous. In *Ned v. The State*, the Court does an act in despite of the prisoner's rights, which might have operated to his prejudice—in the case before us, the Court was merely passive, and under a misapprehension of law, suffered an error to intervene. There, the prisoner was denied the right of trial, by a jury of his own selection—here he was thus tried, but the jury have irregularly returned their verdict.

Suppose the prisoner had been in Court when the verdict of the jury was received, and had then proposed to poll them, and his request been refused, would he have been entitled to a discharge? The refusal, we have seen, would have been an error, yet we are of opinion that it would have been a mere irregularity, which would not have put an end to the prosecution. The objection is not that the prisoner was not allowed, upon request, to poll the jury, but that not being in Court when the verdict was returned, he had no opportunity of making such a request. He cannot certainly occupy a more favorable position than he would do, if the right had been expressly denied.

The judgment of the Circuit Court is reversed, the cause remanded, and the prisoner directed to remain in custody, to await a trial *de novo*, unless, in the *interim*, he shall be discharged by due course of law.

YOUNGE v. HARRIS' ADMINISTRATOR, ET AL.

1. Where one was induced to purchase land by the fraudulent representations of the vendor, in relation to the title, the falsehood of which the vendee had no means of ascertaining, by the exercise of ordinary diligence, he may have relief in Chancery before eviction, and without abandonment of possession.

Error to the Chancery Court, sitting at Cahawba.

THIS was a bill in Chancery, filed by the plaintiff in error, originally in the Circuit Court of Dallas County, and afterwards transferred to the separate Chancery Court at Cahawba, against Bernard Johnson, Administrator of Winfield Harris and Hugh Younge.

The bill alleges that the complainant purchased of Harris, the north east quarter of section number seventeen, in township fifteen, of range seven, of the lands sold at Cahawba, about the 17th of April, 1833, at the price of eight hundred dollars, and executed his notes for the purchase of money, two of which, for two hundred dollars each, were payable in about one year thereafter, and one for four hundred dollars, payable in about two years after. That, Harris pretended he had a title in fee simple to the land, and executed to the complainant a bond in the penal sum of sixteen hundred dollars, with condition to make him a title thereto, on the payment of the purchase money. That on the execution of the notes and bond, he went into possession of the land, and still is in possession. That at the time of the purchase, he was a stranger in the country, and soon after taking possession, heard a rumor in the country, that the land he had purchased belonged to an infant son of Harris; and on going to the land office at Cahawba in May 1833, he there learned from the Register, for the first time, that the east half of the quarter section was entered in the name of Horatio P. Harris, an infant son of the vendor; but was induced by the Register to believe, that the west half was entered in the name of, or belonged to Winford Harris; but at the same time, told complainant, that Harris was in his,

the Register's debt, and that, if complainant would pay him one of the notes for two hundred dollars, that the west half of the quarter section could come out in his name. That afterwards, in April 1834, the Register presented to complainant the receipt of the Receiver of Public Monies at Cahawba, for the said west half quarter, in the name of complainant, with one of the notes complainant had executed to Harris, for two hundred dollars, which complainant paid to him. Copies of the note and receipt of the Receiver, are annexed to the bill as exhibits. He alledges that the presentation by the Register of the receipt of the Receiver, was the first information he had, that the west half of the land had not been entered by Harris; and he charges that at the time of the sale to him, it was vacant and unentered.

That he immediately called on Harris, and proposed to him to rescind the contract, which he refused to do. He alledges that the west half is barely worth the two hundred dollars he paid the Register for it; and offered at the time to deliver it up if he would pay him his money. That the east half is valuable, and worth more than six hundred dollars. That in April 1834, Harris commenced a suit on the remaining note, for two hundred dollars. That Harris is since dead, and administration on his estate, been conferred on Bernard Johnson; that since the death of Harris, he has been informed, that the remaining note of four hundred dollars, has been transferred to one Hugh Younge. That since the death of Harris, the proposition has been renewed to the administrator of Harris, to rescind the contract which he refused. That the estate of Harris is wholly insolvent. Complainant still offers to comply with the contract on his part, if a good title can be made to him, and prays a rescision of the contract, and for general relief.

To this bill, Johnson answered and admitted, that his intestate sold the land, and executed the title bond as stated in the bill; but denies all knowledge of any representations as to his title. He admits that the east half of the quarter was entered in the name of the son of the deceased, but believes that the money was furnished by the father, who was then much in debt. As to the west half, he says that Harris had deposited with the Register, a part of the money, and a que-

bill given for the residue; and by a friendly arrangement between Harris and the Register, the certificate, whenever the land was sold by Harris, was to be filled up to the purchaser; and says that a blank certificate was issued by the Register for the land. Admits that a proposition was made to him to rescind the contract, which he declined. Admits also that the estate is insolvent.

On the 25th February, 1836, the complainant filed a supplemental bill, stating that, since filing the original bill, he has learned more certainly, that the note for four hundred dollars was transferred by Harris to Hugh Younge who had commenced suit thereon, and had since departed this life, and that one Thomas Dickson has become his administrator. That Johnson had reported the estate of Harris insolvent to the Orphans' Court of Dallas county, and that about the month of February, 1835, he abandoned the possession of the east half of the quarter section. Thomas Dickson is also made a defendant to the bill. The evidence supported the allegations of the bill.

J: B. CLARKE, for the plaintiff in error, cited—1 Story's Eq. 198, 200; 2 J. C. Rep. 519; 1 Stew. & Por. 107; 5 Lettell's Rep. 8; 6 Har. & John. 534; 4 Mass. 414; 4 Bibb, 7; 3 *ibid.* 442; 2 Littell, 82; 1 Mass. 230; 3 Munford, 68; 2 Story's Eq. 6, 47; 3 Stewart, 233; 1 Peters', 468; 3 Marshall, 574, 5.

EDWARDS, for defendants, insisted, that the contract could not be rescinded in part. Chitty on Con. 275; Come on Contracts, 39.

That complainant had a remedy at law. 2 Stewart, 331.

That, as complainant retained possession of the land at the time of filing the bill, he could not defend either at law or in equity. 4 Porter, 84; 3 S. & P. 431; *ibid.* 101, 103, 155; 1 *ibid.* 490; 9 Porter, 434; 1 John. Rep. 213, 218.

ORMOND, J.—The argument of the counsel for the defendant in error, is, that the plaintiff in error is not entitled to a decree rescinding the contract, because he has not been evicted, nor abandoned the possession of the land. The decisions of this Court are uniform on this subject, when the question has arisen at law—that the vendee, while he retains the possession, cannot refuse to pay the purchase money; otherwise, it might

happen, that he would get the land without paying for it, as a Court of law, could exact no conditions from him, as the price of affording its aid. But in a Court of Chancery, where the rights of the parties can be accurately adjusted, no reason is perceived why the vendee, who has been induced, by the fraudulent representations of the vendor, to invest his money in the purchase of land, should be required, as a prerequisite to relief in equity, to relinquish the possession of the land, and with it, it may be, his only hope of reimbursing himself. This point has not before been presented in this Court; but we hesitate not to say, that where one by the fraudulent silence, or fraudulent representations of another, in relation to material facts concerning the title of land, the falsehood of which he had not the means of ascertaining, and could not have ascertained by reasonable diligence, is induced to invest his money in the purchase of land, or has made on the faith of such purchase, valuable and lasting improvements, he can have relief in Chancery before an eviction, and without abandonment of the possession.

This point was thus ruled, in the case of *Edwards v. McLeay*, 1 Cooper Select Cases, 308. That was the sale of a dwelling house in Clapham, in which it was afterwards discovered, that the coach house and stables, a part of the Court and driving way leading up to the house, were situate on Clapham Common. The vendor knew of this defect in the title of the premises, and did not disclose it to the vendor. The bill was filed for the purpose of setting aside the sale, and getting back the purchase money. Sir William Plumer, the Master of the Rolls, in the course of his able opinion, says: "Whether it would be a fraud to offer, as good, a title which the vendor knew to be defective in point of law, it is not necessary now to determine; but if he knows and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to the purchaser." What then is the case made by this plaintiff? He asserts, that the vendors knew that the part in question, was an enclosure from the Common; that they did not disclose the fact to him, and that he could not discover it from the abstract. He also asserts, that this part of the purchased premises, is material to the con-

venient enjoyment of the rest. The defendants admit they did make such a representation as is stated, with respect to the whole of the premises, they denying that any part of the premises is on the common; and, if such is the fact, deny their knowledge of it."

An examination of the evidence having resulted in satisfying the Master of the Rolls, that the facts were as stated in the bill, he proceeds to say, "the only other objection the defendants make to the relief sought by the bill, is, that the plaintiff is premature in his application, inasmuch as he has not yet been evicted, and may, perhaps, never be evicted. But I apprehend that a Court of equity has quite ground enough to stand upon, and that it ought now to relieve the plaintiff from the consequences of the fraud practiced upon him." He answers the objection, that the Commoners were barred, and that the Lord might never assert his right, by saying, "though the Lord may never assert his right, is the plaintiff to be compelled to remain for twenty-five years longer in a state of uncertainty, whether on any day during that period, he may not have the convenience of his habitation entirely destroyed? I apprehend that the Court is bound to relieve him from that state of hazard into which the misrepresentations of the defendant has brought him."

Lord Eldon, on appeal, affirmed the decree. He said, "he knew of no such decision, but that if one party makes a representation which he knows to be false, the falsehood of which the other party has no means of ascertaining, a Court of equity will rescind the contract. [2 Swanston's Rep. 303.]

The case just cited, resembles this in every important particular. It was proved by the subscribing witness to the bond given for title, and who was present when the land was sold, that, in answer to a question put by the defendant in error, in relation to the title, the vendor said that the titles were at his own house, where the plaintiff could get them, or see them at any time. The plaintiff was a stranger in the neighborhood; and the witnesses who were examined, and who lived in the neighborhood, did not know that the title was not in the vendor, who was in possession. The fact was, that at the time of the sale, the title to the west half of the quarter section, which

was then sold, was in the United States, and the east half had been entered in the name of an infant son of the vendor.

It is true, that an examination of the land office would have disclosed the true state of the title: but as there was no fact or circumstance disclosed, which was calculated to induce a doubt of the title of the vendor, or put the plaintiff on enquiry, such extreme diligence cannot be exacted. He cannot be censured for relying on the representations of the vendor as to the title, when no circumstance had transpired which should have aroused his suspicions. As soon as a rumor reached him, that the vendor had not title, he examined the land office, and ascertained the fact. He then proposed to rescind the contract, on being paid the money he had paid on the contract, and on the refusal of the vendor to comply with this request, his right to apply to a Court of equity for relief, was perfect.

It was argued by the counsel for the defendants in error, that the vendor could not be called on to make title, until the period, stipulated in the bond, arrived. There might be some force in this objection, if the title had been where he could acquire it; but being in an infant, who could make no title, the vendee could not be required to wait, in a state of uncertainty, the possible event of the title being obtained when the infant attained his majority, unable in the mean time, to make with safety, any valuable or lasting improvement, and finally perhaps, to lose both his land and money. If a Court of Chancery has no power to interpose and prevent such a result as this, it must sit to very little purpose.

No notice has been taken of the fact, insisted on in argument by the plaintiff's counsel, that the west half of the quarter section, was, in fact, purchased from the United States, with the money paid by the plaintiff on the contract, as it does not affect the result.

Nor is it material, whether the defendant, Younge, had notice of the facts, when he took an assignment of the note for four hundred dollars from the vendor, as he is affected by any equity which exists against his assignor.

The decree of the Court below, therefore, dismissing the bill, is reversed, and this Court proceeding to render such decree as the Court below should have rendered, hereby order, ad-

judge and decree, that a reference be made to the master, to state an account between the parties, allowing the complainant interest on the money paid, and a suitable allowance for valuable and lasting improvements, made by him on the premises, and charging him with the value of the use and occupation of the land. That the west half of the quarter section, described in the bill, be sold, and that the complainant be paid out of the proceeds; and if the sale does not yield a sufficient sum, the residue to be paid by the estate of the vendor. That the notes for four hundred dollars, and two hundred dollars given by the complainant on the purchase of the land, be delivered up and cancelled; and that the complainant have a lien on the west half of the quarter section, for the money paid by him.

Let the cause be remanded for further proceedings, in conformity with this decree.

EVANS' ADMINISTRATOR v. STEEL.

1. When a note is dated in May 1837, and promises to pay a sum of money on the 1st day of January, *one thousand forty*, the intrinsic evidence afforded by the note is sufficient to determine, that the day of payment, is the 1st of January, 1840.
2. The plea of *non-claim within eighteen months*, pleaded to a suit brought within less than six months after the liability accrued, is a nullity.
3. The plea of the statute of limitations to a suit, brought within less than six months after the liability accrued, is a nullity.

Writ of error to the County Court of Wilcox County.

ACTION of assumpsit, against the administrator of Thomas Evans, on a note of his intestate, dated, May 18, 1837, payable on the first day of January, *one thousand forty*.

The declaration describes the note according to its terms, and avers, that it was intended to mean, one thousand eight hundred and forty.

The defendant pleaded non-assumpsit, the statute of limitations, and non-claim. No replications were filed, but the case was tried by a jury, which was sworn to try the issue joined. A verdict was found, and judgment rendered for the plaintiff. A bill of exceptions was taken to the instructions of the Court; and this discloses, that the only evidence offered by the plaintiff to sustain his action, was the note described in the declaration.

The defendant requested the Court to instruct the jury, that this was insufficient to warrant a verdict for the plaintiff; and also, unless the plaintiff produced evidence to show that the words *eight hundred* were omitted by mistake in the first line of the note.

This the Court refused, but instructed the jury, if the intrinsic evidence appearing upon the note, shewed the mistake, and also, furnished data for its correction, then it was unnecessary to explain it by other evidence.

The charge given and refused, was excepted to, and the defendant now assigns as error—

1st. That the County Court erred in refusing to instruct the jury, that the evidence was insufficient.

2d. In refusing to instruct the jury, that evidence was necessary to explain it.

3d. Because the jury did not respond to all the defendant's pleas.

4th. Because the case was tried, without any replications to the pleas pleaded.

PROCTOR, for the plaintiff in error, argued, that the note, as written, does not show a mistake. Its language is clear and explicit, and is, therefore, not open to construction. *Brown v. Gilman*, 13 Mass. 161; *Fitzhugh v. Runyon*, 8 John. 292; 2 Starkie, 556.

The plea of the *statute of non-claim*, imposes on the plaintiff, the onus of shewing a demand of the note, from the administrator. [*Evans v. Norris, Stoddard & Co.*, 1 Alabama Rep. 511.]

The case of *Wheelock v. Fitch*, 3 Porter, 387, is relied on, to sustain the 3d and 4th assignments of error.

No counsel appeared for the defendant.

GOLDTHWAITE, J.—1. This case will appear sufficiently clear, from a very brief examination. The note was due on the first day of January, 1840. The omission of the words eight hundred, must have taken place through accident, or by design; but, in either event, the legal construction of the note would be the same. The time of payment, when considered in connexion with the date, divests the note of any uncertainty, and it unquestionably means, what the jury have ascertained to be its meaning by their verdict. It was entirely unnecessary to submit this question to a jury, but the charge given them, contains a proper exposition of the law, as connected with the circumstances of this case.

2. The question raised as to the proof under the plea of *non-claim*, is of no importance. We can, with difficulty, believe counsel serious, when they urge, that this plea can affect a debt due in January, 1840, and suit brought on it in a less period than six months, after the accruing of the debt. Eighteen months must elapse, before there can be any pretence that the debt is barred. [Aikin's Digest, 153, s. 6.]

3. We may apply the same remark to the third and fourth assignments of error. No issue was necessary, for the pleas have no semblance of goodness, even if supposed to be drawn with the utmost precision and accuracy, instead of being interposed merely by name. The plaintiff was authorized to treat them as nullities, when applied to his declaration.

If, however, the pleas were good, the neglect to file replications, is not a matter which affects the regularity of the verdict, as decided in *Abercrombie v. Moseley*, 9 Porter, 145, over-ruling *Wheelock v. Fitch*.

Let the judgment be affirmed.

SIMS, BY HER GUARDIAN v. SIMS ADM'R.

1. It is essential to a *parol* gift of a chattle, that there should be an *actual delivery* of the thing.
2. A father, having rescinded a contract which he had made for the sale of a negro woman, belonging to him, called the woman into the yard, and his daughter Mary (a little girl five or six years old) to the door of his house, and in the presence of several persons, his daughter and the slave, called on the persons present, to take notice that (the woman) Rachel, was the negro of his daughter; and further "In presence of you all, I give this negro to my daughter Mary." Previous to that time, the father frequently declared, that he intended to give Rachel to his daughter; and afterwards referring to what had taken place at his house in the presence of witnesses, declared that he had thus given her. Held, that the evidence of a gift was incomplete, and that to perfect the daughter's title, the father should have parted with the dominion of the slave in her favor.
3. It is not error for the Court to instruct the jury, that, admitting the facts shewn to be true, they do not entitle the plaintiff to recover, if upon the defendant's demurring to the evidence, the Court should have rendered a verdict in his favor.

THIS was an action of *Detinue* brought by the plaintiff in error, in the Circuit Court of Dallas, for the recovery of two female slaves; *to wit*: Rachel about twenty-five years of age, and her daughter Harriet, aged ten or twelve years.

The case was tried on an issue to the plea of *non detinet*. On the trial a bill of exceptions was taken by the plaintiff, to the ruling of the Court. It was shewn to the jury, that Brittain Sims, the father of the plaintiff, at a public sale at his house, in the presence of several persons, in 1832 or '3, called the woman Rachel into the yard, and at the same time called the plaintiff to the door, and there, in the presence of those persons, the plaintiff and the slave, called on the persons to take notice, that the slave Rachel was the negro of the plaintiff; and then said "In the presence of you all, I give this negro to my daughter Mary," "who was then, as the evidence tended to shew, a child five or six years old." The plaintiff from that time to the death of her father, which took place in 1835, continued to live with him. The slave also remained with Brittain Sims during his life, and was used and controlled as his

other slaves; at his death she came to the possession of the defendant as his representative.

It was further shewn, that Brittain Sims had frequently, previous to the time of the public sale at his house in 1832 or '3, said he intended to give Rachel to the plaintiff, and on that day, after Rachel had been sold to a third person, he rescinded the contract, and immediately called upon several persons to witness his declaration of a gift, as stated above.

There was no proof of a delivery to the plaintiff, or any other person, except as stated above. Afterwards, and a short time before his death, in speaking of the transaction, he stated that he had given the slave Rachel, to his daughter Mary the plaintiff.

The Court charged the jury, that though the facts shown in evidence might be true, yet they did not establish a complete gift—but something further was necessary, in order to its consummation. What that was, the Court deemed unnecessary to state.

The jury found a verdict for the defendant, on which judgment was rendered. Thereupon the plaintiff has prosecuted a writ of error to this Court.

J. B. CLARKE and G. W. GAYLE, for the plaintiff.

EDWARDS, for the defendant.

COLLIER, C. J.—All the authorities concur in the conclusion, that it is essential to a *parol* gift of a chattel, that there should be an *actual delivery* of the thing. [Sewall by his next friend v. Glidden, 1 Ala. Rep. N. S. 52. and cases there cited. Sims v. The Adm'r. of Sims, 8 Porter Rep. 449. Bra-shear v. Blassingame, 1 Nott & McC. Rep. 223. Noble v. Smith, 2 Johns' Rep. 52. Linnendale v. Doe & Terhune, 14 Johns' Rep. 222. Wells v. Tucker, 3 Binney's Rep. 370.] The only question in the case before us, is, do the facts set forth in the bill of exceptions, shew that the slaves in controversy or either of them, were ever delivered by Brittain Sims the supposed donor to his daughter the plaintiff.

It is clear that what transpired at the house of the father, on the day of the public sale, does not amount to a gift. No act

was then done, which can be regarded as a delivery, or which seems to have been intended as such. The plaintiff, a small girl is called to the door of the house, and the woman Rachel into the yard, when the father declares that, "Rachel was the negro of the plaintiff," and further "in presence of you all, I give this negro to my daughter Mary." This declaration is positive and direct, and if a gift could be perfected by the mere avowal of the wish, intention, and purpose of the owner of property, the fact shewn to the jury, would be entirely satisfactory. But the subject of the gift, the father, the daughter, and the witnesses, all separate, without the dominion of the slave having been parted with, for a single instant in favor of the intended donee.

But it has been argued for the plaintiff, that if what occurred at her father's house did not invest her with a right to the property sued for, that his previous and subsequent declarations would warrant the inference, that the gift had at some other time been consummated. To sustain this argument, we have been referred to the case of *Grangiac v. Arden*, 10 Johns' Rep. 303. That was an action for money had and received to the use of the plaintiff, to recover a sum of money drawn as a prize in a lottery. It appears that the defendant brought home six lottery tickets, which he said were for himself and wife, and his four children, and he wrote the name of each on the tickets, and put them in his desk. The children were not present at the time. The defendant being afterwards congratulated on his good fortune in drawing a prize, said the ticket belonged to his daughter Eliza, (the plaintiff.) In a subsequent conversation in the family, the son of the defendant said, that Eliza ought to divide the prize with the others, to which the defendant answered, "No, she should not divide it. The ticket was her own, and the prize money belongs to her, and she shall have the whole of it, and I will put it in trade for her." The plaintiff was about eight years old when the prize was drawn, and lived in the defendant's family until she married about twelve years thereafter. Two or three years before the marriage of the plaintiff, her mother being ill, reminded the defendant of the plaintiff's prize money, and requested him to take care of it for her, and the defendant replied, "You know

the ticket was Eliza's; the money is hers; and I have kept it in trade for her to a good profit. I will never take a shilling of it, or of the profit; she shall have it all." It was also proved, by a sister of the plaintiff, that she had frequently heard her father say in their presence, before and since the plaintiff attained her majority, that he had given the ticket to the plaintiff, had indorsed her name thereon, and that the prize money belonged to her.

A verdict was taken for the plaintiff subject to the opinion of the Court, on a case presenting the foregoing facts.

The Court said, that the lapse of time since the transaction took place, ought to be taken into consideration, and induce a more liberal conclusion from circumstances, than should be allowed to more recent transactions. "The evidence," say the Court, "from which the jury have inferred a delivery, is the declarations and acknowledgments of the defendant. And these are numerous, and as full and ample as words could make them. These declarations did not relate to a gift intended to be made; and are not to be viewed in the light of executory promises, to be carried into effect at some future day. But they were confessions that a gift had already been made." After recapitulating the declarations of the defendant as set out in the case stated, the Court say, "All these declarations refer to, and recognize a gift, as having been made. They afforded reasonable ground for a jury to infer, that all the formality necessary to make it a valid gift had been complied with, and the right and title of the plaintiff to the money complete and vested; and that the same was received and held by the plaintiff, for her use and benefit." And a new trial was accordingly denied.

The case cited, it is believed, was a much stronger one in favor of the donee, than the case at bar. The name of the daughter was written upon the ticket before the prize was drawn;—afterwards the father acknowledged that the money was his daughter's, and stated he would put it in trade for her. And about ten years after he had received the prize money, stated to his wife during her illness, that he had put the money in trade for their daughter to a good profit, and that she should have it with all the profit. Strong as these facts are, the

Court did not pretend to say that they were proof positive, of a delivery; but merely that they authorized the inference, that it had been made.

The declarations of the father in the case before us, previous to the day of the public sale at his house, amounted only to this, that he *intended*, not that he had given the slave Rachel to the plaintiff. In the declaration made a short time before his death, it is said that, "in speaking of the transaction, he stated that he had given the said slave to his daughter, Mary, the plaintiff." The transaction of which he speaks, must have been the rescission of the contract, by which he sold Rachel, and afterwards declared that she was the property of his daughter. This appears from the order in which the facts are narrated in the bill of exceptions, as well as from the consideration, that there was no other transaction proved. As no delivery was shewn on the day of the public sale, and as the subsequent statement referred to what then occurred, it follows that no delivery can be intended.

While we should be pleased to give effect to every prudent disposition of property, founded on a valuable consideration, or prompted by natural love and affection, we are constrained to declare, that an ancient and well established rule of law, interposes a barrier to the plaintiff's recovery. A rule, which (if we had the power to disregard,) a wise policy requires should be upheld.

As the Court undertook to inform the jury, that such was the defectiveness of the proof, they should find for the defendant, the plaintiff is entitled to occupy a position in this Court, quite as favorable as if the case had been disposed of upon a demurrer, by the defendant, to the evidence. But after making all presumptions in her favor, which could have been legitimately made by the jury, we cannot say that the Circuit Judge erred in his charge.

In concluding that the gift sought to be established, wants an essential constituent, viz: delivery, we have been influenced by the consideration, that the possession of the slave remained with the father. In *Seawell*, by his next friend, vs. *Glidden*, 1, Ala. Rep. N. S. 52, it appeared that the donee was of very tender years when the gift was made, and contin-

ued to reside with the donor, his father, up to the death of the latter, and had not, at the time of that event, attained his majority. The Court held that the gift, having been perfected by delivery and acceptance, was irrevocable by the donor. That "the donee, on account of his infancy, was not entitled to *actual* possession of the slaves, and could do no act to prejudice his rights; and inasmuch as he could not act in respect to the property, it seems necessarily to follow, that he cannot be injured by an omission to act." And further, that as the donee had no guardian appointed under the statute, who was authorised to take possession of the slaves, the possession of the father was the possession of the donee, and not even a badge of fraud. With the law, as there laid down, I am entirely satisfied; but the case at bar, is not at all analogous, for here the gift, as we have seen, was never perfected.

We have only to add, that the judgment of the Circuit Court is affirmed.

GOLDTHWAITE, J.—I concur with the Chief Justice, in affirming the judgment of the Circuit Court; but my judgment is influenced by reasons, differing in some respects, with those advanced by him.

It is admitted by all, that delivery is essential to the validity of a gift by parol of a personal chattel, yet there is much contrariety of decision, as to the facts which make out a case of delivery. I hold it necessary to constitute a delivery, when the term is used in connexion with a gift by parol, that the chattel given, should be divested of the dominion of its former owner. It is clear, I think, in this case, that the dominion of the father was never divested, but always continued as it was before the supposed gift.

I admit a delivery may be proved by the admissions of those who are interested; therefore, the declaration of the father, that he had given the slave to his daughter, would be evidence from which, a delivery might be inferred in the absence of other proof. Here, however, the facts show that the dominion of the father remained and was exercised at all times, until his death. The inference arising from his declaration is completely destroyed; and there was nothing but this in the case, to

have warranted the jury in finding for the plaintiff. As the entire evidence is presumed to come from that side, the defendant properly asked, and the Court gave the instructions, that admitting the whole of the evidence to be true, it did not make out a gift.

ORMOND, J.—It is not my habit to dissent from the opinion of the majority of the Court, if I merely entertain doubts of its correctness; but in this case, I feel satisfied the decision is rested on a principle which cannot be sustained.

The evidence in the Court below was, in substance, that at a public sale at his own house, the father of the plaintiff, having sold a negro girl, induced the purchaser to rescind the sale to enable him to give the slave to his daughter. The sale being rescinded, he called the negro into the yard before him, and the plaintiff to the door of the house, and then called on the persons present to take notice that he gave the slave to his daughter Mary, who was then about six years old. His daughter lived with him until his death. The father employed the slave so given, as he did his other slaves, down to the time of his death, but had frequently, before the public sale spoken of, declared his intention to give the slave to his daughter Mary; and a short time before his death, speaking of this transaction, said he had given the slave to the plaintiff. The Court charged the jury, that these facts and circumstances did not in law amount to a gift.

There can be no doubt, that to constitute a pure gift of personal property, delivery of the thing is an essential ingredient of the act; and if a delivery cannot be concluded out of the facts here detailed, the gift was not consummated.

It will not be denied, that the fact of delivery is, like every other fact, susceptible of being proved by inference from other facts and circumstances. Thus, if the child to whom this property was thus given, had resided elsewhere than at the house of the *donor*, and the slave was afterwards found residing with her, the influence would have been irresistible, that there was a delivery in fact. On the other hand, if the negro had remained with her former master, no such inference could fairly be made from the facts supposed. But in this case, the child

living with her father the *donor*, the property was where it should be, to be in her possession, as much as a child could have possession of property, if it had been given to her by a stranger.

It rarely happens, I apprehend, that in any case of the gift of a slave, the senseless mummary is gone through of placing the hand of the slave in the hand of the donee. The gift is usually manifested by word, and the delivery inferred from the subsequent possession by the donee. The utmost then which can be said on this part of the case, adverse to the plaintiff, is that the fact of delivery was doubtful. Conceding this to be correct, for argument sake, is there no other fact which, thrown into the scale, will make it preponderate in favor of the donee? I think there is. The father a short time before his death, said he had given this slave to the plaintiff. What is there in this case to prevent this admission from having the weight it is entitled to? The father certainly knew what he had done, and was speaking against his own interest; and unless some reason can be discovered, which has not presented itself to my mind, which will disarm it of its influence, it is conclusive to shew that the gift was perfect.

This admission is also important in another point of view. The majority of the Court consider, that the fact of the father continuing to exercise control and dominion over the property, after the supposed gift, is conclusive to shew that there was no delivery. It is true that a gift, as it transfers to the donee the possession, puts an end to the right of the donor, to control it afterwards; when therefore, after any supposed gift, if the donor is found exercising dominion over the subject of the gift, it does not prove that no gift was in fact made; because such control may be exercised by the permission of the donee, or it may be a usurpation of his rights. For I take for granted, that a gift, accompanied by delivery, is as absolute and unconditional a transfer of property, as a *bona fide* sale would be. But as such a state of things would not be the usual consequence of a gift, it would doubtless cast on the donee, the necessity of explaining the apparent incongruity. This an adult might do, by showing that the subsequent possession was by his permission, or was an invasion of his rights—

and in this case is effected by the proof, that the donor was an infant incapable of attending to her own interests, or of apprehending the consequence of such acts; and, if possible, still more conclusively, by the admission of the donor, that the slave did not belong to him.

From the manner in which the charge was given, it must be considered as in the nature of a demurrer to the evidence, otherwise it cannot be supported; and I think, from the solemnity and publicity of the act—from the fact that the donee was an infant residing with her father, the donor—and especially from the donor's subsequent admission, the jury were not only authorized, but were bound to infer a valid gift of the property. I might add, that if the facts, detailed in this case, do not constitute a gift, it is difficult to say in what manner a father could give property to his child.

I consider that this question was in effect determined, when this case was previously before this Court. [8 Porter, 449.] The Court below had charged the jury "that a delivery and *change of possession* was necessary to the validity of a gift, and that if there had been no such change of possession, the gift was absolutely void." This Court reversed the judgment, on the ground, that the jury were probably misled by the stress which the Court laid on the necessity of a *change* of the possession. "The gift," this Court then said, "was complete at the instant of delivery; and if any argument had been urged against the fact of delivery, because the slave remained with the donor, her former master, the Court should have left it to the jury to determine, whether that fact was not explained by its being also the home of the donee." Now, unless the jury could have inferred, that the child living with her father was in possession of the slave, the judgment of the Court should have been affirmed.

The facts of the case are not varied, and, from the nature of the charge, we have to pass on them; and, as we then held that the control of the father might be explained by the fact that it was also the home of the donee, such is the law of the case now.

I consider the case of *Grandiac v. Arden*, 10 Johns' Rep. 298. cited in the opinion of the Court, an authority in favor of

the view I am taking. In that case as in this, there was no proof of a delivery in fact of the subject of the gift, which was a lottery ticket. The proof on that head was, that a father, who had purchased some lottery tickets, wrote the names of his children upon them; *they were not present at the time*. One of the tickets drew a prize, and on being congratulated on his good fortune, he said the money belonged to his daughter, to whom he had given the ticket. Subsequent declarations to the same effect were also proved to have been made by him. The Court held that the acknowledgements of the defendant afforded a reasonable ground from which the jury might infer, that all the formalities necessary to make a perfect gift, were complied with.

I think it is impossible to distinguish this case from the one at bar; the principle involved in both, is precisely the same, as the facts are almost identical. It is therefore my opinion that the Court erred in its charge to the jury.

J. H. & L. S. OWEN v. BROWN.

1. Where there is more than one representative of a deceased person, the writ must be served on all; but, if one resides out of the State, he need not be sued.

Writ of error to the County Court of Mobile.

DUNN, for plaintiff in error.

CAMPBELL, contra.

ORMOND, J.—The suit was brought by the defendant in error, against the plaintiffs in error, as administrator and administratrix of George W. Owen, deceased. The writ was served but on one of the defendants below, and a judgment by default taken against both.

This is not authorized by law. The representatives of the deceased must all be served with process. [Minor's Rep. 77.] But if one resides out of the State, he need not be sued. [Williams & Ivey Ex'rs. v. Sims et al., 8 Porter, 579.]

Let the judgment be reversed, and the cause remanded.

THE STATE v. JOHN, A SLAVE.

1. When a slave has been convicted of a capital offence, it is not a sufficient reason to arrest the judgment, that the jury have omitted to assess his value, and to ascertain what portion of it shall be paid by the State to his owner, in pursuance of the provisions of the act of 1824. [Aikin's Digest, 124, s. 60, 64.]

Question reserved as novel and difficult, by the Circuit Court of Sumter County.

THE prisoner was indicted for the crime of murder, and convicted. The indictment charges, that he is a slave, the property of one Anderson, and it does not appear that, after returning the verdict of guilty, the jury were again sworn, then or at any other time, to assess the value of the slave.

This omission was urged as a reason why sentence should not be pronounced on the verdict, and the presiding judge, considering the question as novel and difficult, referred it to the Supreme Court.

SMITH, with whom was ERWIN, for the prisoner, insisted that the omission was a defect fatal to the prosecution, and for which the judgment ought to have been arrested. It is not sufficient that the prisoner has been found guilty; the statute prescribes other proceedings for the benefit and security of the owner, it is true, but public justice cannot be satisfied at the expense of a private wrong. [Aikin's Digest, 124, s. 60, 64.] The constitution declares, that private property shall not be

taken for, or applied to, public purposes, unless a just compensation shall be made therefor. [Art. 1, s. 13.] The principle which is now contended for, was recognized in *The State v. Flora*, 4 Porter, 111, when this Court held, that the omission to prove the ownership of the slave, as alledged in the indictment, was fatal to his conviction.

STEELE, with whom was the ATTORNEY GENERAL, contra.

GOLDTHWAITE, J.—If the statute referred to, imposes on this Court the duty of declaring a conviction void, when the proceedings are regular, and the verdict just, it presents, to say the least of it, a most singular anomaly in legislation.

The act, which it is supposed authorizes the arrest of judgment, is in these words: "Whenever, in the trial of any slave for a capital offence, the jury shall return a verdict of guilty, the presiding judge shall have the same jury sworn to assess the value of the said slave, and the verdict of the said jury shall be entered on the records of the Court; and the master or owner of the said slave, producing to the Comptroller of Public Accounts, a transcript from the records of the Court, regularly certified by the Clerk, and a certificate of the sheriff that any slave has been executed, in pursuance of the sentence of the Court, shall be entitled to receive a warrant on the Treasurer, for one half of the amount assessed by the jury, to be paid out of the fund hereinafter provided for that purpose." A tax is then permitted to be assessed on all slaves, to produce the necessary fund; and another section of the act provides, that "after the jury have found the value of the slave as aforesaid, they shall also say, what portion of the same the master shall have, which, in no case, shall exceed one-half of the value so found; and the prosecuting officer shall enquire into all the facts which go to shew the portion of blame attached to the master, that the jury may rightly assess the amount he shall have."

We may admit to the fullest extent, that, if the Legislature has prescribed a rule, Courts must enforce it, however repugnant the policy of the rule may be to their own views; but, in our opinion, the statute does not involve any of the consequences which are supposed by the counsel for the prisoner, to be attendant on it.

The Legislature has considered it expedient to provide, that slaves shall be partially paid for by the State, when executed for any crime, if the jury shall consider the master as entitled to any portion of the assessed value of the slave. Whether this act was induced by an impression, that the Constitution enjoined some similar provision as a duty, or from a desire to promote public justice, by making it compatible with private interest, is not important now to enquire. It is sufficiently certain, the act was made for the benefit of the owner, and affords no immunity whatever to the slave ; it does not assume to confer any privilege on the culprit.

The act is declaratory to the Court, to ascertain the value of the slave, by the same jury which has pronounced his guilt ; but this is merely the mode by which the value is to be made known to the accounting officers of the State. If any other mode had been enjoined, it would have the same connexion with the slave, as this. The reason why the jury was directed by the act to ascertain the value of the slave, probably was, because all the facts and circumstances would be in evidence before them, and therefore, they would be more impartial, or, at least, as much so, as any other umpire who might be selected.

The last clause, cited from the statute, seems to be conclusive to shew, that the view we take is the proper one. The jury is not bound to give the master any portion of the value when blame attaches to him ; and we may not shut our eyes to the fact, that the master is charged as accessory to the fact, of the crime of which the slave is found guilty, though we have no wish to assume, that such is the fact ; but, if admitted to be so, what chance or what right would he have for compensation, by the verdict of a jury ?

If the Circuit Court, under this statute, is bound to be active instead of passive, and has neglected a duty which it should have performed, the master has doubtless some remedy for the value of his slave ; but an omission in this particular, cannot avail the convict ; he must abide the penalty which the law awards to his crime, although his master may never be compensated.

The case of *The State v. Flora*, 4 Porter, 111, has been supposed, by the counsel for the prisoner, to sustain his position. It was there ruled to be necessary to prove the ownership of the slave, as alledged in the indictment, because the master was entitled to whatever compensation should be allowed under this act. Whatever apparent analogy there may be between that case and this, it extends no farther than to the *proof* requisite under the indictment. The proof before the jury must have been satisfactory on this, as on every other allegation, or the verdict should not have been as it is. We do not think we should be justified in extending the principle of the case cited, to any proceedings subsequent to the conviction; for, as we have shewn, this statute was intended for the benefit of the master, and it rests with him to proceed in the investigation for the ascertainment of the value of the slave. If he omits it from motives of delicacy or otherwise, he is thrown on the justice of the Legislature for relief.

With respect to the argument raised on the thirteenth section of the bill of rights, we cannot arrive at the conclusion, that its framers ever thought, much less intended, to interpose a check on the legislative power to punish crimes against the peace of the community, or the lives of its citizens. If a slave cannot be lawfully executed, until he is paid for by the State, he certainly cannot be legally confined, until compensation is made to his owner, for the injury about to be done to his private right. It is impossible to say which of these positions is false, if either is true; and we dismiss the examination, perfectly satisfied that the constitutional inhibition, respecting the taking of private property for public uses, without making compensation, has no bearing on this conviction.

We think the Circuit Court properly determined the question referred to this Court, and that the judgment ought not to be arrested.

ELY, USE, &c. v. WITHERSPOON.

1. In expounding a contract, the intention of the parties, to be gathered from a view of all its parts, the subject matter, time, place and manner of performance, must exert a controlling influence.
2. The defendant made his promissory note, by which, about twenty-seven months after date he promised to pay to plaintiff, as attorney, &c., of the Connecticut Asylum, &c., "at Hartford, for the education and instruction of the deaf and dumb, the sum of three thousand three hundred and thirty-nine dollars and eighteen cents, at the Mechanics' Bank, in the city of New York, with lawful interest from date till paid, (but if the principal sum shall be punctually paid when due, then, in that case and not otherwise, the interest is to be deducted,) value received, Tuscaloosa, State of Alabama, 3d February, 1841." Held that the fair intendment is, that the contract, which occasioned the making of the note, required the payment of interest from its date, but the high rate of exchange (of which, the history of the times afford ample evidence,) on the North Eastern cities, and the risk in effecting a remittance thither, induced the payee to agree to remit the interest, if payment was promptly made. And the defendant not having paid the principal at maturity, was liable to pay interest from the date of the note.

THIS was an action of debt brought by the defendant in error, against the plaintiff in the Circuit Court of Greene, on a promissory note of the following tenor:

"\$3339 18. On the first day of May eighteen hundred and twenty-three, we jointly and severally, promise to pay William Ely or order, as attorney and agent of the Connecticut Asylum, for the education and instruction of deaf and dumb persons, otherwise, called the American Asylum, at Hartford, for the education and instruction of the deaf and dumb, the sum of three thousand three hundred and thirty-nine dollars and eighteen cents, at the Mechanics' Bank, in the city of New York, with lawful interest from date till paid (but if the principal sum shall be punctually paid when due, then, in that case and not otherwise, the interest is to be deducted,) value received, Tuscaloosa, State of Alabama, 3d February, 1841.

"SAM'L. WITHERSPOON, [Seal.]

"JOHN .W STEPHENSON, [Seal.]

"CHARLES LEWEN,"

"WM. THOMAS."

The cause being submitted to the jury, a question arose as to the measure of damages, to which the plaintiff below was entitled in consequence of the detention of his debt. Whereupon, "the Court charged the jury, that the plaintiff was only entitled to interest from the maturity, and not from the date of the instrument;" to which charge, the plaintiff excepted, &c.

The jury having found a verdict in obedience to the instructions of the Court, and judgment being thereon rendered, the plaintiff has prosecuted a writ of error to this Court.

COLLIER, C. J.—In *Dinsmore v. Hand*, Minor's Rep. 126. It was decided, that where a party makes his promissory note, payable at a future day, with interest from the date, if not punctually paid, the interest accruing between the date and its maturity, must be regarded as a penalty, and is not recoverable. This case has been recognized in several subsequent adjudications. [*Fuqua & Hewitt v. Carriel & Martin*, Minor's Rep. 170.—*Henry & Winston v. Thompson, et. al.* *ibid.* 209.] These cases are confessedly controlled by the principle, which maintains, that where payment of a less sum is secured by a greater, the latter is a penalty. The Court cite with approbation, the doctrine, that the damages are to be considered as stipulated, "where there is a clear, unequivocal agreement, which stipulates for the payment of a certain sum, as a satisfaction, fixed and agreed upon by the parties for doing, or not doing, certain acts expressed in the agreement."

In *Plummer v. McKean & McKean*, 2, Stewt Rep. 423. it appears that the defendants made their bill single, for the payment, to the plaintiff, of two thousand dollars at a future day; which sum was dischargeable by the payment of sixteen hundred dollars "in par money, at New Orleans." The Court adhered to the principle, which influenced the decision of the cases cited from Minor's Reports; but considered that the case then under consideration, formed an exception to it; and that it might be inferred from the phraseology of the contract, the distance of the place where the money was to be paid, the difference of exchange, and the advantage of prompt payment by the obligee, that two thousand dollars was the debt actually due. And in *Jordan v. Lewis*, 2, Stewt Rep. 429. The ques-

tion was, what sum was recoverable on a promissory note, for the payment of forty-one dollars and twenty-five cents, on the 25th December, at the close of which note, were the following words: "If paid October 1st., thirty-three dollars is to satisfy this note." The court held, that this agreement "was a benefit to both parties, and therefore, not a penalty; a benefit to the payee to receive his money before it was due, and a benefit to the payor in discharging the debt by the payment of a less sum;" and the maker not having availed himself of the benefit tendered, he was adjudged liable to pay the note, with interest after its maturity.

[Nichols v. Maynard, 3. Atk. Rep. 520.] is considered a leading case on this subject. There it appears, a mortgage was executed at four and a half *per cent.*, with a proviso, that if the interest be paid after each half year, before three-quarters of a year became due, the mortgagee would accept of four *per cent.* The Lord Chancellor, Hardwicke said that, "as the mortgage is at four and a half *per cent.*, with a proviso, that if the interest be paid after each half year, before three-quarters of a year became due, the mortgagee will accept of four *per cent.*; if the mortgagor fails of paying the interest at the appointed time, he cannot be relieved in this Court, any more than on any other composition between parties, because, the abate of half *per cent.* by the mortgagee, was for prompt payment; and the terms of the agreement not being complied with, the mortgagee and his representative are entitled to interest at four and a half *per cent.* But if the mortgage had been made with a reservation of four per cent. interest, with a proviso, that, upon non-payment thereof, within a certain time after it is due, the mortgagor shall pay five *per cent.*, such a proviso would not be good, as has been determined several times; because where the interest is to be increased, if not paid at the day, that is but a *nomine pænæ*, and relievable in equity." Mr. Sanders, the learned editor of Atkyns, cites Jory v. Cox. Prec. Cha. 160. Brown v. Barkham, 1. P. Williams' Rep. 652. Walmsley v. Booth. Barn. Cha. Rep. 481. Holley v. Wyse. Vern. Rep. 289. Strode v. Parker, 2. Vern. Rep. 316. Hallifax v. Higgons 2. Vern. Rep. 134. I have looked into the case of Bonafous v. Rybot, 3. Bun. Rep. 1374. and

find that it fully sustains the distinction taken by Lord Hardwicke in *Nichols v. Maynard*.

It is exceedingly difficult, to lay down rules of *universal application*, by which to ascertain whether a contract stipulates damages, or merely provides a penalty as a means of securing the performance of some duty. It has been said there can be no settled rule depending on the form of the contract; otherwise, parties by framing their contracts, in compliance with the form, could easily convert a real penalty into stipulated damages; and, in the language of a learned and very exact Judge, "the griping creditor would always use the particular form, or phraseology, of contract, which would secure him his pound of flesh." In expounding a contract, the intention of the parties, to be gathered from a view of all its parts, the subject matter, time, place, and manner of performance, must exert a paramount and controlling influence; and it is by a reference to these, that its general character is to be determined, and its classification fixed.

In the case at bar, the defendant in error expressly stipulates for the payment of interest, from the date of his note, and on a day certain, promises to pay the principal and interest in the city of New York, a place near that, where the association, who is entitled to the money, is located. The fair intendment is, that the contract, which occasioned the making of the note, required the payment of interest from its date; but that the high rate of exchange (of which we are informed by the history of the times) on the north-eastern cities of the union, and the risk in effecting a remittance thither, induced the payee to agree to remit the interest, if payment was promptly made. Upon this hypothesis, the plaintiff must have derived a benefit from a punctual payment in New York, perhaps equivalent to the amount of interest which had accrued previous to the maturity of the note. But if he is only allowed to recover the note with interest since it became due, then he must remit the amount at his own cost and risk, and although by the terms of his contract, he had secured himself against such a result.

We will not inquire whether the note does not amount to an absolute stipulation, on the part of the maker, to pay the amount expressed in it, with interest from date; and whether

the agreement by the payee to remit the interest, upon payment being promptly made, is not a condition in the contract, not at all changing the makers liability, unless it was literally performed. The intention of the parties, we think, is sufficiently shewn by the circumstances we have mentioned; and unless payment had been tendered at the time and place designated, no abatement of interest can be claimed by the defendant in error.

We are therefore of opinion that the judge of the Circuit Court erred in his instructions to the jury. The judgment is consequently reversed, and, inasmuch as the rate of interest in New York can only be ascertained by a jury, the cause is remanded.

HONEYCUT, USE, &c. v. STROTHER.

1. H. sold to S. a tract of land which he had previously purchased from A., and for the payment of which, A. held three notes on H., and it was agreed that S. should execute three notes for the same amount, and to fall due at the same time with those held by A. on H., which H. agreed to substitute for those held by A. on him. Held—that if H. failed to substitute one of the new notes for one of the old ones, and S. paid one of the notes thus held by A., it was a valid defence to one of the notes executed to H. by S. when sued on by H. for the use of another.
2. In such a case, it is no objection to the agreement, to substitute the new notes for the old, that it was parol merely, on the ground, that it did not vary the terms of the written agreement.

Error to the County Court of Dallas County.

THIS was an action of assumpsit, brought by the plaintiff in error, against the defendant in error, in the County Court of Dallas, on a promissory note, for nine hundred and fifty dollars.

To a declaration in the usual form, the defendant pleaded non-assumpsit, want of consideration, failure of consideration,

and set-off, and, on issues joined on the pleas, the defendant had judgment.

Pending the trial, a bill of exceptions was taken, by which it appears, that the plaintiff and defendant, some time in the year 1836, entered into a contract by which the former sold to the latter certain lands, which he had previously purchased, or a part thereof, from one Solomon Adams, and had given Adams three notes for the same, each amounting to nine hundred and fifty dollars, and had received from Adams a bond for title, when the purchase money should be paid. That, when the purchase was made by the defendant of the plaintiff, Adams held the same. It was agreed that the defendant should execute to the plaintiff three notes of the same amount and date, with those due from the plaintiff to Adams, and that the plaintiff should give the same to Adams, to take up his own notes. This agreement was verbal. The plaintiff, instead of doing so, disposed of the notes, and the note sued on, which is one of them, was by him transferred to Crocheron, for whose use the suit is brought. It appeared from the evidence of Adams, that he had been paid in full, all the claims he had on the plaintiff.

It further appeared, that the plaintiff had traded the note sued on previous to June, 1837, on which this suit was commenced in May, 1838. That Adams, who sold to Honeycut, had purchased two hundred and forty acres of the same land, from one Cathcart, who had given bond to make Adams title, upon full payment of the purchase money. That the defendant, on the 27th January, 1838, gave his own note to Cathcart, for four hundred and thirty-one dollars, thirty one cents, the balance due by Adams to Cathcart, on the purchase, and that the same was paid by Strother, previous to the commencement of this suit. It also appeared that Crocheron had given the defendant notice, that the note on which this suit is founded, belonged to him, and that he had paid three hundred and sixty-five dollars of the plaintiff's debts. It also appeared, that Strother, on the 27th January, 1838, paid one of the notes executed by the plaintiff to Adams for the land, deducting out of the same, the four hundred and thirty-one dollars thirty-one cents, paid to Cathcart. It also appeared, that all the aforesaid incumbrances on the land, were due on or before

the first January, 1838, and the amount paid by the defendant was then unpaid.

Upon this evidence, the plaintiff's counsel asked the Court to instruct the jury, that they must look to the bond of Adams to the plaintiff, and assigned by him to the defendant, with the five notes then executed, for the sole evidence of the contract, which the Court refused; and instructed the jury that parol evidence might be received, to prove that the substitution of the defendant's notes formed the consideration.

The plaintiff's counsel also requested the Court to charge, that the failure of the plaintiff to substitute the notes of the defendant, in lieu of his own in the hands of Adams, was not a total or partial failure of consideration; which charge, the Court refused, and charged the jury that, if they believed that the consideration passing to Strother was the transfer of the notes given by the plaintiff to Adams in the place of the notes Adams held on him, the failure of the plaintiff so to substitute them was a failure of consideration.

The plaintiff further moved the Court to charge that, as Strother was in possession of the land, there was no relief at law, which was also refused by the Court. To all which the plaintiff excepted, and now assigns as error.

GEORGE GAYLE, for plaintiff in error, cited 4 Stew. & Por. 96; 5 *ibid* 410 and 88; 1 Ala. Rep. (N. S.) 436.

That vendee being in possession, could not defend at law. Sug. on Ven. 347. 352; 1 Stewart, 490; 1 Stew. & Por. 71; 3 *ibid*, 355, 431; 1 Ala. Rep. (N. S.) 287, 622, 645.

That the defendant, if entitled to relief, must resort to a Court of Equity. *Smith v. Pettus*, 1 Stew. & Por. 107.

EDWARDS, *contra*.

ORMOND, J.—It is the settled law of this Court, that a purchaser of land, in possession, cannot refuse the payment of the purchase money for any defect of title in the vendor, as is conclusively shewn by the authorities referred to by the counsel for the plaintiff in error. But it does not appear, that the defence set up to this note, is a want of title in the vendor; it

is a breach of a parol agreement, which the vendor entered into at the time the notes for the purchase money were executed. That agreement was, that three of the notes, which the defendant executed to the plaintiff, should be exchanged for three notes of the same amount and falling due at the same time, which the plaintiff owed to one Adams. The reason of the arrangement was, that the land had been purchased by the plaintiff from Adams, and these notes were a part of the purchase; and, until they were paid, the defendant could not get title to his land, which was to come from Adams. It was then, in substance, an agreement, that the defendant should become the paymaster of the notes, held by Adams on the plaintiff; and, in effect, the plaintiff became the agent of the defendant to substitute the new notes for the old.

The question then, which is presented is, can the plaintiff, in disregard of this agreement, transfer the notes made for this particular purpose, and thus subject the defendant to the payment of both sets of notes; for, although the defendant was not a party to the notes due from the plaintiff to Adams, until they were discharged, he could not obtain a title to his land.

It is true, that, if the plaintiff had himself paid off the notes which Adams held on him, he would have been reinvested with the title to the new notes, and could have transferred or maintained an action on them in his own name, unless, in pursuance of the agreement, the defendant without notice of such payment, had acquired claims against Adams. That this is the true view of the case will be apparent, if we suppose the plaintiff to have retained the notes in his hands, and that the defendant had discharged the notes held by Adams; it would seem very clear, that, by operation of law, the notes held by the plaintiff, and which were the mere representations of those held by Adams, would be extinguished. Through the dim twilight of the bill of exceptions in this case we discern, that, in this manner, the controversy arose in the Court below. It is stated in the bill of exceptions, that Adams had been paid in full, all the claims held by him against the Plaintiff; but it is not stated by whom he was paid. It is further stated, that Strother, the defendant, paid to Adams one of the notes which he held on the plaintiff. It is also stated, that Crocheron had

given notice, that the note sued on was his property, and that he had paid three hundred and sixty-five dollars of the plaintiff's debts. Why this last fact was stated, does not appear; but it is calculated to raise an inference, that Honeycut is insolvent, and that this is a struggle between two of his creditors, on which a loss shall fall.

The inference which we deduce from the bill of exceptions is, that the plaintiff failed to substitute one of the notes executed by the plaintiff for one of the notes held by Adams—that this note the defendant has been obliged to pay, and by consequence, on the principles here laid down, the payment to Adams was a payment of the note which should have been substituted for it, but was withheld by the plaintiff. If in this we are mistaken, the fault must rest with those whose duty it was to present the point in a plain and distinct manner.

It is however objected, that the agreement for the substitution of the notes, being merely verbal, was a variance of the written agreement of the parties, and therefore void. The only written evidence of the agreement of the parties, was the assignment by the plaintiff of the bond of Adams to the plaintiff, and the notes executed for the purchase money: and we cannot perceive, that the parol testimony referred to, contradicts or varies it; but is entirely consistent with it. The cases of *Murchie v. Cook and McNab*, 1 Ala. Rep. (N. S.) 41; and *W. & J. Simonton v. Steele*, *ibid* 387, are in principle like the present. In both of those cases, it was held to be admissible, to prove by parol a particular mode of payment or discharge agreed on by the parties.

It results, from what has been said, that there is no error in the charge of the Court, and the judgment is therefore affirmed.

THE STATE, AT THE RELATION OF HILL v. BURNETT.

1. The refusal of the Circuit Court to allow an individual to file an information, in the nature of a *quo warranto*, is a final judgment, which can be reviewed on a writ of error, whenever the object of the information is to ascertain the relator's rights to the usurped office or franchise.
2. In such a case it is immaterial, whether the relator proceeds by a rule on the incumbent, to show cause, or whether he asks for leave to file the information.
3. The cases in which the Courts exercise a discretion in granting or refusing the leave, seem to be those in which the term of the disputed office will expire before the information can be decided; or when the relation is made by one not claiming the office.
4. When the relation is made at the instance of one claiming the disputed office, and a *prima facie* case is made by his affidavits, he is entitled to be placed in the proper condition to assert his rights in due course of law; and all disputed facts must be determined by a jury.

Writ of Error to the Circuit Court of Wilcox County.

MOTION for leave to file an information in the nature of a *quo warranto*, against Burnett for usurping the office of Sheriff of Wilcox County.

Notice was given to the defendant by the relator, that this motion would be made at the Fall Term, 1840. In support of it the affidavit of the relator was produced, which states his election as Sheriff of said County, by the people thereof, at the general election in August, 1838; that he was commissioned by the Governor, on the 13th of the same month, whereby he was entitled to hold the office for the term of three years, which is yet unexpired; that he has in no wise, by resignation, abandonment, or otherwise, forfeited his right to exercise the office; and that Burnett, the defendant, for seven months, then last past, had usurped and taken on himself to exercise the said office.

The defendant appeared and recited the motion. He produced many affidavits, none of which deny the original claim of the relator, but most of which showed that the relator had been absent from the County from December, 1839, until April 1840, and for a longer period than four months. He also,

showed that the judge of the County Court had enquired into the fact of the absence, and consequent vacation of the office, by the relator, pursuant to the act of 1825. [Aikins' Digest, 100;] and had certified the fact of the vacancy to the Governor, who thereupon commissioned the defendant. He also, showed that, at the August election, for the year 1840, he was elected Sheriff by the people of Wilcox, and under that election, was again commissioned. He also showed that the relator was a non-resident when the motion was made.

The Circuit Court refused to allow the information to be filed. The relator prosecutes the writ of error and assigns the refusal as error.

PROCTOR, for the plaintiff in error, insisted that the relator was entitled to have the merits of his claim considered in due course of law, and to have the disputed facts ascertained by a jury. *King v. Harwood*, 2. East, 177. *Commonwealth v. The Union, Fire, & Marine, Ins. Co.* 5. Mass. 230. 5 Chitty, Gen. Pract, 552.

As to the jurisdiction of the Court to review the judgment, he relied on *Ethridge v. Hill*, 7 Porter, 47.

EDWARDS, for the defendant, suggested that a *mandamus* was the appropriate remedy, if the Circuit Court has improperly refused the information. If this is not the proper course, it cannot be reviewed on error, because the granting or refusing the information is entirely within the sound discretion of the Court; and, from the affidavits submitted, there can be no question but that the office was vacated by the relator under the statute.

To show that it is a matter of discretion, and not of right he cited, 2 John, 184; 14 S. & R. 216; 3, Mass. 285; 4 Cowan 382. Harden, 17.

GOLDTHWAITE, J.—1. In the case of *Ethridge v. Hill*, 7, Porter, 47, the same objection, as is now urged, was taken to reviewing the decision of the Circuit Court on a writ of error; but we then considered that there is no reasonable distinction between refusing to grant a writ, by which the parties' rights could be ascertained, and an erroneous judgment, by

which they might be compromised. In that case, the writ of error was prosecuted on the refusal to allow a *mandamus*; but we think the same principle applies to a refusal to allow an information, in the nature of a *quo warranto*, when the relation is made at the instance of an individual, and when the object of the information is to ascertain the relator's right to the usurped office or franchise.

2. We hold it to be immaterial in such a case as this, whether the relator proceeds by a rule to show cause; or whether he asks in the first instance, for leave to file the information. The former course would be without objection, but would necessarily involve more delay than is consistent with justice, when the inquiry affects an office, which is held for a very limited period.

The practice of proceeding in the first instance, by asking leave to file the information, seems however, to be equally correct, when notice of the motion is given, and sufficient time allowed to the defendant to prepare such affidavits as may be proper in opposition to the information. If, however, sufficient time had not been given, it at all times would be within the discretion of the Court to extend it. But it will hereafter be seen in what cases the defendant is authorised, to rebut the affidavits of the relator previous to forming an issue or issues of fact upon the information.

3. The main question which has been argued, is, with respect to the discretion, which the Circuit Court has to grant, or refuse, the leave to file an information of this description. It is certainly one of novelty, and likewise of much difficulty.

It is laid down in most cases, that the action of the Court is entirely discretionary and cannot be claimed as a matter of right. But we apprehend that this is the law only in those cases which still retain the character of State prosecutions. Such would an be information at the instance of one who laid no claim to the office supposed to be usurped; so likewise, when the franchise involved no question of private right, as in the cases of corporations, either public or private.

There is also another class of cases, in which the discretion of the Courts has been recognized; but these are where the contested office is held for a term, which must expire before the

right can be adjudicated. *People v. Sweeling*. 2 John, 184. *Commonwealth v. Athearn*, 3 Mass. 285.

4. The convenience of this mode of proceeding has rendered the old writs for ascertaining a right to an office, or franchise, entirely obsolete, and it may be questioned, whether they would now be effectual, even if admitted to be in force, inasmuch as in such suits, the judgment could only operate *in personam*. However this may be, the information in the nature of a *quo warranto*, when pursued by an individual claiming a right to an office, has long since lost its character as a State prosecution, and is now governed by the same rules as civil actions. *Rex v. Francis*. 2 Term. 484.

It is not our intention now to review the cases on this subject; they are nearly all collected in Comyn. vol. 6. tit. *quo warranto*; 3, Bacon Ab. tit. information; and in 4 Cowan, 100 note. We may remark however, that it seems clearly settled; even in those cases when the Courts exercised only, a discretionary power, whenever the right, or the fact on which the right depends is disputed; or when the right turns on a point of new or doubtful law; or when there is no other remedy, the information is usually granted.

On the whole, we are of opinion that, when the relation is made at the instance of one claiming a disputed office or franchise, and a *prima facie* case is made by his affidavits, he is entitled to be placed in the proper condition to assert his rights in due course of law; and to have all disputed facts determined by a jury.

In the present case, the relator asserts, that he is legally entitled to exercise the office of Sheriff, because he was elected and commissioned in 1838, and has never resigned, abandoned, or otherwise, vacated his right to the office. On the other hand, the defendant admits, that the relator once was the Sheriff; but he insists, and it may be conceded, that he, by the affidavits submitted, fully establishes, that the office was vacated by the absence of the relator from the County, for more than four months.

Now it is very evident, that the absence is a question of fact; and as it is asserted by the one, and denied by the other, it can only be properly determined by a jury. We, probably,

should arrive at the same conclusion, as did the Circuit Court, on the affidavits, but neither the absence for four months, the abandonment of the office, or the non-residence of the relator can be determined by the Court, unless admitted by the pleadings. The relator swears that he has neither resigned, abandoned, or otherwise, vacated his office. Whether he has done so, is a proper issue to the country.

The judgment of the Circuit Court is reversed, and is here rendered, that the said relator have leave to file his information, appearing in the transcript, and the case is remanded for further proceedings on the information.

FRYER v. DENNIS.

1. If, on the trial of the right of property, under the statute, the jury find a verdict for the plaintiff in execution, though the claimant become liable to satisfy the execution to the amount of the value of the property in controversy, yet the title to the same, does not vest in him; consequently, it is not error for a judgment condemning the property, to direct that it be sold by the Sheriff to satisfy the execution.
2. When the claimant of property is unsuccessful upon the trial of the right, he becomes liable for the costs of the proceeding, and the property in dispute, cannot be sold in order to relieve him from the charge.
3. The claimant of property levied on, cannot discharge his surety from the obligation incurred by their bond to the plaintiff in execution, (without the consent of the latter) by substituting a bond with other surety; although such second bond be offered, for the purpose of restoring the competency of the surety in the first, as a witness.
4. A certified copy of a deed duly acknowledged and recorded, is inadmissible as evidence, without accounting for the absence of the original.
5. The claimant of property levied on, cannot object to any irregularity in the judgment or execution.

Writ of error to the Circuit Court of Pike.

A writ of *fieri facias*, issued by the Clerk of the Circuit Court of Pike, on a judgment recovered in that Court by the defendant in error, against William Y. Fryer, being levied on

certain slaves, the plaintiff in error made an affidavit, that the slaves were his property, and executed a bond with surety to try the right, pursuant to the statute. An issue was made up, and the case submitted to a jury, who found the slaves subject to the execution, and assessed the value of each. Whereupon, the Court rendered a judgment as follows: "It is therefore considered by the Court, that the said negroes so found subject to the plaintiff's execution, be liable to, and sold by the sheriff, agreeably to the statute in such case made and provided, and that execution issue against the said claimant, to be levied on the said property, together with the costs expended in this behalf."

Pending the trial, a bill of exceptions was taken by the plaintiff in error, to the ruling of the Court, which, so far as it is material, is in these words, "The claimant finding the testimony of Theodore G. Boyd, one of his securities on his claim bond, material to the proving of his title, offered to give a new bond with other securities, and to discharge the liability of said Boyd, in order to render him competent as a witness, and moved the Court for leave so to do; which the Court refused, on the ground, that Boyd's interest could be released only by the act of the plaintiff in execution, and rejected him as incompetent," &c. Further, "The plaintiff in execution, offered in evidence the record of a deed of trust, duly certified and recorded, of goods, made in August 1838, and after the execution of the bill of sale, under which claimant held, by the defendant in execution, to a trustee, to secure certain debts therein specified, without first offering to produce the original, or shew where it now is, or account for its loss, and without having given notice to produce the same; the claimant objected to this, as incompetent testimony, but the Court overruled the objection, and allowed the record to be read," &c. To all which the plaintiff in error excepted, &c. The claimant also objected to the admission of the execution in evidence, because the individual issuing it (though authorized by the clerk,) was not appointed and qualified as a deputy, in the manner prescribed by the statute.

PECK & CLARK, with whom was J. COCHRAN, for the plaintiff in error. No counsel appeared for the defendant.

COLLIER, C. J.—The assignments of error present for our examination, the legal questions arising upon the judgment and bill of exceptions.

The bond executed by the plaintiff, conforms to the act of 1838. The first section of that statute enacts, that "It shall be the duty of the sheriff to prepare a bond, whenever property levied on by him, shall be claimed and affidavit made, and good security offered for the trial of the right thereof; which bond shall be made payable to the plaintiff in execution, and conditioned for the forthcoming of the property, if the same be found liable to the execution, and for the payment of such costs and damages as shall be recovered for putting in the claim for delay," &c. By the third section, it is made "the duty of the jury, in all cases, when they shall find the property subject to the execution, to find the value of each article separately; and if the claimant shall fail to deliver the same, or any part thereof, when required by the sheriff, it shall be the duty of the sheriff to go to the clerk, and endorse such failure on the bond, by him returned, with a copy of the execution, whereupon, said bond shall have the force of a judgment, and the clerk shall issue execution, &c. for the value of the property not delivered," &c.

It has been argued for the plaintiff in error, that the verdict and judgment determining the slaves to be subject to the execution of the defendant, vested a title to them in the claimant; and that the direction in the judgment "that they be sold by the sheriff," &c. is irregular and unauthorized. This argument, we think, cannot be maintained. An unfounded claim cannot certainly divest the lien of the plaintiff in execution, or the title of the defendant; these remain quite as operative and valid as if no act had been done by the claimant. It is clear that, under the statute, the claimant cannot be compelled to contribute to the satisfaction of the execution more than the value of the property claimed; and if its value should be more than adequate to the payment of the execution, it would be exceedingly unjust, that a claim ascertained by a jury to be unfounded, should give a title to the excess.

The claimant in the condition of his bond, has stipulated that he will have the "negroes forthcoming, if the same be found

liable to the execution." Now the inference was but fair, that the claimant would perform his undertaking, viz: that he would deliver the slaves to the sheriff. This being done, it would have been the duty of the sheriff to sell them, to satisfy the execution of the defendant in error. The judgment then, merely directs the sheriff to do what duty required. But it is unnecessary to consider this argument at greater length, as its justness is directly negatived by the case of *Lindsay v. King*, 3 Porter's Rep. 406.

In respect to the costs, consequent upon the trial of the right of property, they were properly chargeable upon the claimant; and the property claimed, cannot be burthened with their payment. But, even if this be not a mere clerical misprision, amendable in the Circuit Court, it is at most an error, not prejudicial to the plaintiff in error, and he cannot consequently avail himself of it here.

The surety in a bond, for the trial of the right of property, engages with the plaintiff in execution, that the claimant shall prosecute his claim to effect; and in the event of failure to do so; that he will discharge the obligation devolved upon him by law. Here then, is a clear case of a contract, from which the claimant cannot, at his mere pleasure, absolve the surety. The recognition of an opposite principle, would receive no sanction from precedent, or the analogies of the law. We are aware that the competency of sureties as witnesses has, in practice been restored by the substitution of new bonds; but this is the first case, in which the regularity of such a practice has been questioned in this Court. We are not prepared to say, that the surety might not be examined by the claimant, where the property levied on, is delivered to the sheriff, and a sum of money deposited with the clerk, sufficient to cover costs; or where the claimant deposits with the clerk, a sum adequate to the satisfaction of the execution, and all costs which may accrue. By adopting such a course, it would seem, that the claimant might render his surety entirely disinterested. The plaintiff in execution could not, with propriety, object, for he would be made secure, independently of the responsibilities of the surety. We will not, however, undertake to decide, that the surety could, under such circumstances, be

permitted to give evidence for his principal, as such is not the aspect in which the case is presented. But we are entirely satisfied, that the claimant cannot discharge the surety from his undertaking with the plaintiff in execution, against the consent of the latter.

In regard to the admission as evidence, of the copy of a deed without accounting for the original, or taking the legal steps to obtain it, we think the Court erred.

Our statutes in regard to the registration of deeds of land, make a certification of their acknowledgment on probate, written upon or under the same, evidence of their genuineness; and further provides that, "If the original deed or conveyance be lost or mislaid, or be destroyed by time or accident, and not in the party's power to produce, the record of such deed or conveyance, and the transcript of such record, certified to be a true transcript, by the clerk in whose office the record is kept, shall be received in evidence, &c." It is also provided, that certified copies of patents received in the office of the clerk of the County Court, &c., shall be admitted as evidence. These are the only enactments in regard to the admission of copies of registered deeds as evidence; and supposing them to be applicable to deeds and conveyances of personal estate, yet the defendant, in offering a copy of the deed, which was read on trial in the Circuit Court, did not make the preliminary proof, which was requisite. The copy then, should have been excluded upon the ground, that the original, which was a higher grade of evidence, should have been produced, or its absence accounted for. This conclusion is sustained by the cardinal rule of evidence, which we have stated, and is inferrable from the cases of *Scott v. Rivers*, 1, *Stewt & Porter's Rep.* 19; *Mitchell v. Mitchell*, 3 *Stewt & Porter's Rep.* 81; *Mordecai v. Beal*, 8, *Porter's Rep.* 529; *Swift v. Fitzhugh*, 9 *Porter's Rep.* 39; *Smoot v. Fitzhugh*, *ibid.* 73.

The Circuit Court very properly refused to entertain the objection of the claimant, to the execution of the defendant in error. It has been repeatedly adjudged, that the regularity of the judgment and execution cannot be questioned on the trial of the right of property. *Collingsworth v. Horn*, 4 *Stewt &*

Porter's Rep. 237; Perkins & Elliott v. Mayfield, 5. Porter's Rep. 182.

But for the error in the admission, as evidence of the copy of the deed, the judgment is reversed and the cause remanded.

TICKNOR v. LEAVENS' EX'R.

1. In a case where the defendants are adults, it is not error to decree a sale of mortgaged premises, without first ascertaining by the report of a Master, whether the amount due might not have been raised by the sale of a part of the mortgaged premises; unless it be suggested, that such a reference is proper.

Error to the Chancery Court at Mobile.

THIS was a bill filed in the Court below, by the defendant in error, to foreclose a mortgage. A decree having been made, and a sale ordered, in the event the debt was not paid, the defendant below prosecutes this writ of error, and now assigns for error, that there was no reference to the Master to ascertain whether the premises admitted of division, and whether the amount might not be raised, by a sale of a part.

GAYLE & PHILLIPS, for plaintiff in error.

CAMPBELL, contra.

ORMOND, J.—The objection made to the decree in this case, is rested on the case of Walker et als. v. Hallett, 1 Ala. Rep, (N. S.) 391. In that case, there was a reference to the Master. to ascertain whether it would be most for the interest of the parties, to sell the estate entire, or in separate lots. The Master reported, that it was most for the interest of the parties to sell the premises in separate lots, if it could be conveniently divided. The fact being thus ascertained by the Master, that it was for the interest of the defendants to sell the premises in sep-

arate lots, we held, that the Master should have proceeded further, and ascertained whether it was susceptible of division; and that it was error, in a case where infants are concerned as defendants, to render a decree, giving the Master the option at the sale, to do, or omit to do, that which should have been previously ascertained by the Master's report.

It was not our intention to make such a requisition necessary in every case where adults are the sole defendants—though, doubtless, it would be the duty of the Court in any case of this character, when it was suggested that such a reference was proper, to cause the reference to be made.

There is no error in the decree of the Court below, and it is therefore affirmed.

INNERARITY v. FROWNER.

1. When one becomes a party to a suit, as the administrator of him by whom it was instituted, it is unnecessary to set out the letters of administration; as the defendant, in such a case, is presumed to be always before the Court, and has the opportunity to controvert the right of the person offered to become a party, when he is proposed as such.
2. When a suit is continued, and the continuance entered of record, the parties are then discharged from attendance, until the next term. It is erroneous, afterwards, and during the same term, to proceed to final judgment.

Writ of error to the Circuit Court of Mobile County.

ACTION of assumpsit, commenced by Samuel Acre, in the Spring of 1838. At the Spring Term of 1840, his death was suggested, and James Frowner, his administrator, made a party. The record does not shew how Frowner was appointed, nor is there any evidence of his right, to make himself a party, appearing in any part of the proceedings. The defendant having failed to appear and plead, an interlocutory judgment by default was taken, and the case continued until the next term of

the Court, at which the damages were directed to be assessed. Another entry appears to have been made during the same term, and probably on the same day, which recites that, at a former day in the term, a judgment by default had been taken, and a jury directed to come and assess the damages; therefore, then came a jury, who, &c, proceeding with the verdict of the jury, assessing the damages at five hundred and eighty-five dollars, for which sum judgment was rendered.

Innerarity now prosecutes his writ of error, and assigns many causes for the reversal of this judgment, all of which relate to the manner of reversing the suit, without setting out the title of the administrator, and the final judgment after the case was continued.

STEWART, for the plaintiff in error.

CAMPBELL, for the defendant.

GOLDTHWAITE, J.—1. After the defendant was served with the process in this case, it became his duty to attend to the progress of the suit, until he should be discharged temporarily, by its continuance from time to time, or finally, by its termination, by the judgment of the Court. We must, therefore, presume that he was before the Court, when the plaintiff's death was suggested, and the administrator made a party. Then was the proper time to contest the right of the administrator to become a party to the suit: and the sufficiency of his title could have been tested by an issue of law, or of fact, as the circumstances of the case might have required.

The want of a *profert in curia* of the letters of administration, in the case of *Coopwood v. Taylor*, 7 Porter, 33, was held not to be available after verdict; and by the English practice, is only matter of special demurrer. We think the same principle must apply to a case of this description, in which the administrator becomes a party after its commencement. Justice requires nothing more, than that the defendant shall be permitted to controvert, if he chooses to do so, the title of the administrator, when he is proposed as a party to the suit.

We do not consider that it is necessary, that more should be stated in the record than the suggestion of the death of the

plaintiff, and the admission of his personal representative as a party.

2. It appears that this suit was continued after the interlocutory judgment by default was taken, and that the damages were directed to be assessed at the ensuing term. Afterwards, and during the same term, the damages were assessed, and a final judgment rendered. It is not important to enquire, whether this was done on the same, or a different day, as, in either event, our opinion would be the same. Should it be conceded to be a matter of discretion with the Circuit Court, to set aside a continuance once made and entered of record, which concession, however, we should be slow to allow, it is obvious, such is not the case as presented, because there is no order setting aside the continuance.

It was error in the Circuit Court to proceed, after the case was continued, and the judgment is therefore reversed, and the case remanded.

DUNN & WIFE, ET AL. v. THE BANK OF MOBILE, ET AL.

1. A gift or bequest to *a married woman and her children, born and thereafter to be born*, does not invest her with an estate *to her sole and separate use*, independent of the marital rights of her husband.
2. The meaning of an instrument must be ascertained, generally, from the terms employed; and if these are plain and intelligible, or the instrument can operate, the acts of the parties, claiming under it, are inadmissible, to shew the intention of the party executing it.
3. If an instrument be in the form of a deed of gift, and called such, still, if its purpose be testamentary, and it is only to be consummated by death, it will be admitted to probate, as a will.
4. A gift by will, to children born, and to be born after it takes effect, is good as an executory devise, as it respects the after born children.
5. A bequest to a married woman and her children, born and thereafter to be born, makes them tenants in common—joint-tenancy and its consequences, being abolished in this State.

6. If the right of the husband has vested, by his possession of property given to his wife and children jointly, the share of the wife may be levied on by an execution against the husband; but the children may, by suit in equity, injoin proceedings upon the execution until partition is made, &c.
7. *Semle*—If the marital rights of the husband have not attached upon property given to the wife, the latter may apply to equity to prevent the husband from obtaining the possession, until he makes a suitable settlement upon her.
8. Where it was alledged in a bill, seeking to injoin an execution against particular property, upon a suggestion that it did not belong to the defendant, that the same property had been previously levied on by another execution against some of the defendants, at the suit of a different plaintiff, which execution had been enjoined,—Held, that such an allegation was not a ground for equitable relief—it did not appear, but that the first injunction was prayed upon a ground having reference to the judgment or process itself, and not to the property levied on.
9. The first section of the act of 1826, “to provide a speedy remedy against the obligors in injunction bonds,” applies only to bonds executed, in cases in which *the judgment shall have been enjoined*.

This cause comes here by writ of error from the Chancery Court, sitting at Cahawba.

THE plaintiffs in error were complainants below in their bill. Among other things, they state, that on the fourth of March 1833, Christian N. Sims, the mother of Mrs Dunn, by deed, duly executed and recorded in the office of the Clerk of the County Court of Dallas, gave to her daughter, and to the children of her daughter, then in life, and thereafter to be born, sundry slaves and other property.

It is further stated, that Mrs. Sims, on the 9th of September, 1833, made and executed her last will and testament, by which she bequeathed to Mrs. Dunn, and her children, sundry slaves and other property.

The complainants alledge, that the slaves mentioned in the deed and will of Mrs. Sims, were intended by her for the separate use and enjoyment of Mrs. Dunn, during her life, and at her death, to be divided among her children; and that such intention had been acknowledged and acquiesced in by the complainants, ever since the death of Mrs. Sims.

The deed and will referred to in the bill, are made exhibits. and copies thereof accompany the same.

Several of the slaves transferred by the deed, being levied on by writs of *fieri facias* against the estate of John Dunn, the

husband, an injunction was awarded, on the prayer of the complainants, to restrain the sale of the same.

The deed and will both declare, that Mrs. Sims gave to her daughter, and the children of the latter, the slaves named in each, as well as other property, without indicating an intention, that Mrs. Dunn should have a life or other estate, to her separate use. At the close of the deed there is a provision in these words, "This deed, it is understood and agreed, is subject to this condition, that is to say, I am to retain the possession and use of said land and negroes, and the profits of them, if I choose, during my life; with this reservation, the deed, in all other respects, and for every purpose, to be established and final." There is no certificate, or other *memorandum*, in the record, showing that the will of Mrs. Sims, had ever been admitted to probate.

The complainants further allege in their bill, that they believe one of the executions, against which an injunction was sought, was for the same identical debt, for which an execution had been previously issued against other defendants, on a delivery bond, and the levy of which, on the slaves now in controversy, was enjoined—which injunction was in full force.

Two of the defendants answered jointly, denying all matters alleged in the bill, which are not particularly noticed above, and not admitting those, but insisting in their answer, upon the benefit of a demurrer to the bill, for the want of equity.

On motion of the defendants, the Chancellor dismissed the bill, for want of equity; being of opinion, that the deed and will conveyed the slaves in controversy "to Mrs. Dunn and her children absolutely," and that such was the intention of Mrs. Sims, as expressed therein. The Chancellor held further, that the *interest given to Mrs. Dunn* in the slaves, was subject to the satisfaction of the executions against her husband and directed "that the injunction bond have the force and effect of a judgment."

The plaintiffs here assign for error, that the Court erred in dismissing the bill, for want of equity; and that the decree is erroneous, in giving to the injunction bond, the force and effect of a judgment against any of the obligors, and especially

against Mrs. Dunn, who was a *feme covert* at the time of its execution by her.

G. W. GAYLE and J. B. CLARKE, for the plaintiff.

EDWARDS, for the defendant.

COLLIER, C. J.—First: Neither the paper, which has been designated as a deed of gift, nor the will of Mrs. Sims, invest her daughter, with a *separate estate* for life, or any other period in the property conveyed by them. In *Lamb v. Wragg & Stewart*, 8 Porter's Rep. 73. it was held, that where property is given or bequeathed to a married woman, without any qualification of the manner in which it is to be possessed or enjoyed, it will vest subject to the ordinary legal and marital rights of the husband. But, if there be a fairly and clearly expressed intention of the donor, that the wife shall have an estate therein to her own separate use and disposal, such intention shall take effect.

In the case before us, the terms in which the property is given, are general and unqualified, to Mrs. Dunn and her children, so that it cannot be pretended that the former was entitled to a separate estate for life in all, or any part of the property given.

The interpretation of the deed and will, cannot in general, be controlled by the acts of the parties claiming under them; but, for the purpose of ascertaining their meaning, we must look to the terms employed—these being clear, and not requiring extrinsic aid, parol evidence of intention is inadmissible. The acquiescence of the children of Mrs. Dunn, in her claim to a *separate estate for life*, cannot therefore, invest her with such an interest.

Second: The deed was only to become operative upon the death of Mrs. Sims, unless she should elect during life, to part with the possession of the property it disposes of. If an instrument be in the form of a deed of gift, and called such, still, if its purpose be testamentary—if it is only to be consummated by death, and not to operate during life, probate will be granted of it as a will. [*Lovell on Wills*, 317, 25 Vol. L Lib; *Henry v. Ballard*, 2 Carr. L Rep. 595; *Lyles v. Lyles*, 2 Nott

& McC. Rep. 531; Milledge v. Lamar, 4 Dess. Rep. 617; Druce v. Dennison, 6 Ves, Jr. Rep. 385.

If necessary then to effectuate the intention of the donor, the deed may be regarded as a testamentary paper, and operate as such. Regarding it as a will, the gift to the children of Mrs. Dunn, to be born after its execution, may take effect as an executory devise. [2 Bla. Com. 173; Lovell on Wills, 325; (3 Vol. L. Lib.) Smith v. Attersoll, 1 Russell's Rep. 266; Claffin v. Perry, 12 Mass. Rep. 425; Nasar v. Smith, 3 Dess. Rep. 550; Pratts Lessee v. Flamer, *et al.* 5 Har. & John's Rep. 10; Wilkinson v. Adam, 1 Ves. & B. Rep. 422; Doe, *ex dem.* Clarke v. Clarke, 2 H. Bla. Rep. 399.

The deed does not give to Mrs. Dunn, an estate for life, in the land and slaves described in it, to the exclusion of her children during that period. The donor declares the intention, that Mrs. D. and her children then in life, (who are designated by name) and those thereafter to be born, shall enjoy her bounty, immediately after her death. As a joint-tenancy and its consequences have been abolished in this State, all who are provided for by the deed, are made *tenants in common*; those in life obtaining an interest *in præsenti*, immediately upon the donor's death, and the children born after that event, becoming upon their birth, entitled to an equal share with their mother, and elder brothers and sisters.

Third: The bill does not deny, that such a possession has vested in the husband, in the property given and bequeathed by Mrs. Sims, as would cause his marital rights to attach; and we cannot intend anything beyond the allegations of the bill. If the husband's rights, in virtue of his marriage, did vest in possession, the levy was regular; and, be this as it may, the reverse is not alledged to be true. [Williams & Battle v. Jones, at this term.]

Though the levy may be regular, yet the children of Mrs. Dunn, might arrest by injunction proceedings thereon, until partition shall be made, and may require security to insure contribution from their mother's share, so as to provide shares for after born children. Williams & Battle v. Jones—*supra*.

So, if the marital rights of the husband had not attached, we will not say, that it was not allowable for the wife to obtain

an injunction, and through the medium of a Court of Equity, a settlement out of the property given and bequeathed to herself and children. [Atherley on Marriage Sett. 350.]

Fourth: The ground upon which an injunction was obtained against levying an execution in another case, against the property now in controversy, is not stated in the bill; and we cannot know, but it had reference to the judgment or process itself, rather than the condition of the slaves. If so, there can be no pretence for holding that the pendency of that injunction, forms, in the present case, a substantive cause for equitable interference.

Fifth: By the first section of the act of 1826, "to provide a speedy remedy against the obligors in injunction bonds," it is enacted that "every bond executed for the purpose of obtaining an injunction, shall, on the dissolution of the said injunction, have the force and effect of a judgment; and it shall be lawful for the party or parties, whose judgment may have been enjoined, to take out execution against all the obligors in the bond, for the amount of the judgment which shall have been enjoined, together with lawful interest thereon, and also the costs incurred in and about the said chancery proceedings." Though the first clause declares, that "every bond" &c. shall have the force and effect of a judgment," yet the succeeding words clearly limit it to cases, in which the "judgment" shall "have been enjoined." In the case before us, the judgment remained in full force, and the execution itself was only suspended, as against the property levied on. The bond then, did not operate as a judgment, and the decree of the chancellor, declaring that such should be its effects, is consequently erroneous, and must be reversed. And as the rights of the children of John Dunn and wife, cannot be definitively settled upon the bill in the present case, the bill is dismissed, without prejudice to the children. The cost of this Court are to be paid by the defendants in error, and the costs in the Court of Chancery, are to be paid by the plaintiffs.

CREIGHTON, ET ALS. v. PAINE & PAINE.

1. When a sale is made by virtue of a decree in Chancery, the Court has power to put the purchaser in possession, when it is withheld by the defendant, or any one who has come into possession *pendente lite*.
2. When possession after such a sale is withheld, the proper course is, for the purchaser to petition the Court, setting forth his purchase, the deed under which he claims the land purchased by him, and by whom the possession is withheld, and that notice has been given of the application. If the possession is withheld by one who is concluded by the decree, the Chancellor will direct a writ of possession to issue. If this order be not obeyed, an injunction will issue, and if not obeyed, a writ of assistance will issue as a matter of course.
3. An appeal cannot be prosecuted, by the person in possession, against the complainant, to an order directing possession to be given to the purchaser, but must be prosecuted against the purchaser.

Error to the Chancery Court at Mobile.

THIS bill in Chancery was filed by the defendant in error against William Creighton to foreclose a mortgage.

UPON the answer of the defendant, the Court decreed a sale of the property described in the bill. A sale was advertised by the complainant, and postponed to a day beyond the next term. At the next term, the order of sale was revised. During the next vacation, a sale was made, but the purchaser failing to comply with the terms, the property was again sold to the Planters' Bank by the Register, at his risk.

When the Register reported the sale to the Chancellor, he suggested that, since the decree and before the sale, the defendant had died. The Court confirmed the sale.

At the next term, on application of the purchaser, the following order was made. "At a preceding term of this Court, a sale of the mortgaged premises was ordered by the Court; after decree and before sale the mortgagee died, leaving a widow and children. The Register went on to make the sale, and now the widow of the mortgagor and his children, being in possession, refuse to surrender it to the purchaser; on her part, on the ground, that she is entitled to dower, and on theirs, that

a descent has been cast on them; the purchaser moves for a writ of possession, and it is ordered that such writ issue.

On the same day Mary Creighton, the widow of William Creighton, and William, Mary and Eliza Crieghton, her children, came and prayed an appeal from the order last made, which was granted by the Chancellor.

The appeal bond is executed payable to the complainant.

Mr. STEWART, for the plaintiff in error,

Mr. CAMPBELL, contra.

ORMOND, J.—The counsel for the plaintiff has brought to the notice of the Court several matters, which occurred previous to the application of the purchaser for the writ of possession; which, if erroneous, cannot be noticed at this time, as there is no party now before the Court, who has the right to complain.

The object of the appeal, is to review an order of the Chancellor, directing a writ of possession to issue against the widow and children of the original defendant.

It was denied by the counsel, for the plaintiff in error, that a Court of Chancery had power to put a purchaser, under the decree of the Court, into possession of the premises, at least, without notice to the person in possession, that application would be made for such an order. It appears to be very clearly settled, that a Court of Chancery has the power after a decree of foreclosure and sale of the mortgaged premises, to put the purchaser in possession, if the possession is withheld by the defendant, or any person, who has come into possession under him, *pendente lite*. This is an incident of the right of the Court to foreclose the mortgage and decree a sale of the premises. The whole proceeding is *in rem*, and the decree acts upon the possession, which is sold with the land. It would indeed be a strange anomaly, if the Court, which passed on the rights of the parties, and ordered a sale of the land, could not perfect its act by putting the purchaser in possession, but must turn the party over to obtain the possession by another suit.

The mode however, in which this was attempted, is altogether irregular. The proper course is for the purchaser to

petition the Court, setting forth his purchase, the deed under which he claims, and particularly describing the land purchased by him, and by whom the possession is withheld, and that such person has had notice of the intended application. If, on examination, the Chancellor is satisfied that the possession is withheld by some one, who is concluded by the decree, that is, by the defendant himself, or some one who has come in under him *pendente lite*, he will make a decretal order, that the possession be delivered to the purchaser, unless the master had been previously, directed by the decree of foreclosure, to put the purchaser into possession. If this order be not complied with, on application, an injunction will issue commanding those in possession forthwith to deliver it up; and on affidavit of service of the injunction, and refusal, a writ of assistance to the Sheriff to put the party in possession, issues of course, on motion, without notice.

That this is the practice of the Court, is shewn by Chancellor Kent in the case of *Kershaw v. Thompson*, 4 John Chan. Rep. 609; and *Dove v. Dove*, 1 Bro. 375.

It was insisted by the defendant's counsel, that, authority was given by statute to the Chancellors, to issue a writ of possession, but that power is only given where a decree is rendered on a bill for specific performance. See Aikins's Dig. 287.

But although this proceeding is wholly irregular, and unauthorized either by statute, or by the course of proceedings in a Court of Chancery, it cannot be redressed in this Court on the present application.

This appeal is taken by those in possession against the complainants, and the bond to prosecute the appeal is executed to them. But they are not actors in this proceeding; but, so far as we can gather from the record, are entirely passive.

The order of the Chancellor recites, that the purchaser moved for a writ of possession, which was granted on his motion. It is therefore irregular to prosecute the appeal against parties, who have had no agency in producing the result complained of, and have no interest in contesting it; for the reason, therefore, that this appeal is not prosecuted against the Planters' & Merchants' Bank, the purchaser of the premises sold under the decree, the appeal is dismissed.

BARTLETT & WARING v. LANG'S ADMRS.

1. Where an exception is regularly taken during the progress of a trial, but the bill of exceptions is deferred to be signed at a more convenient time, and the term of the Court is terminated after the entry of the verdict and judgment, by the Judges' withdrawing from the bench, and by his refusing to return to it—if the Judge refuses to sign the bill of exceptions, it will be allowed by the Supreme Court, and ordered to be filed, on proof of these facts.
2. When a judge fails, or even refuses to sign the minutes of the Court over which he presides, this does not invalidate the record; the fifteenth section of the act of 1819, Aikin's Digest, 245, s. 28, is merely directory to the judge.
3. The clerk of the Court is the proper custodian of its records; and full credence is to be given to his official act in certifying them. If there should be reason to suppose, that mistakes or omissions have been made in completing any record, it is within the power of the proper Court to rectify them, and place the record in its proper condition.

Motion by the plaintiffs in error, to be allowed to file a bill of exceptions, under the act of 1826. (Aikin's Digest, 254, s. 5.)

THE facts attending this case, as they appear by affidavit, are these :

The case was tried in the Mobile Circuit Court, at the November Term, 1840, some two or three days before its termination, in the manner hereafter to be described, and exceptions were taken by the plaintiff to the charge of the Court. The bill of exceptions was prepared on the same day of the trial, and was submitted to the counsel of the defendant, on that or the next day, by the direction of the presiding Judge. The bill of exceptions was soon after returned to the plaintiffs' counsel, and no objections made to it by the adverse counsel. On the same day, and before the bill of exceptions was presented to the presiding Judge for signature, the trial was terminated by his leaving the bench, to which he did not return afterwards.

The gentleman presiding as Judge, held the office under an executive commission, and having understood that the Legislature then in session, had elected another person as Judge, considered his authority at an end. He declined to do any official

act, after the information was received by him. Application was made to him, to sign and seal the bill of exceptions, prepared as before stated, but he declined to act, stating that he was no longer Judge, and therefore could neither examine into the correctness of the exceptions, nor sign the bill as an exception.

It was further stated, that the minutes of the proceedings of the Court, were not signed by the presiding Judge.

STEWART, for the motion.

CAMPBELL, contra.

GOLDTHWAITE, J.—We have no hesitation in granting this motion, under the authority of the act of 1826. (Aikin's Digest, 254, s. 5.) It appears that the Court was suddenly terminated, by the Judge withdrawing from the bench, to which he did not return; consequently, the plaintiffs' counsel could have no opportunity to present his exceptions in Court, after the refusal of the Judge to sign them. The state of facts is so different from those which existed in the case of Perkins v. Harper, 2 Stewart, 477, in which a construction was given to the act of 1820, that it cannot be considered as governing this case. We are entirely satisfied with the evidence of the exceptions, and direct the bill to be filed with the transcript of the cause, as a part of the record in this Court.

2. As it was urged in the course of the argument of this motion, that the bill of exceptions was entirely unnecessary, for the reason, that no legal effect could be given to the judgment, because of the omission to sign the minutes of the Court, it may be proper to remark, that we do not consider the act of a Court invalidated, because the presiding Judge may fail or even refuse to sign, or otherwise authenticate, the proceedings. The fifteenth section of the act of 1819, Aikin's Digest, 245, s. 28, directs, "that the records of the respective Courts within this State, for each preceding day of every session, shall be read in open Court, in the morning of the succeeding day, except on the last day of the term, on which day they shall be signed by the Judge presiding in said Court." But, as this act is merely directory, and does not declare the record invalid, if either the

reading or signing is omitted, we cannot arrive at the conclusion, that it was intended to make these formalities essential.

3. The fiftieth section of the act of 1807, Aikin's Digest, 83, s. 7, makes it the duty of the Clerks of the several Courts in the State, to make up and enter on well bound books, to be kept by him for that purpose, a full and complete record of all the proceedings in each suit or prosecution. Many other enactments provide for the safe-keeping and certifying of the records by the Clerks of the several Courts; and heavy penalties are imposed on them, for a neglect of duty. (Aikin's Digest, 84, s. 12, 13; *ibid.* 241, s. 24, 26.)

The Circuit Court is invested with jurisdiction expressly given by statute, to examine and correct any omissions, neglects, corruptions, or defaults of their Clerks. (Aikin's Digest, 243, s. 18.)

These citations from our statutes, shew most abundantly, that the Clerk is the proper custodian of the records, and that to him is confided the care of making them in proper form. The Courts necessarily must possess the supervising power, to examine into and correct the errors which may occur.

Such being the case, we have no difficulty in arriving at the conclusion, that full credence is to be given to the official act of the Clerk of one of our Courts. If there should be reason to suppose, that mistakes or omissions have been made in the course of completing any record, it is within the power of the proper Court to rectify, and place the record in its proper condition.

ARMSTRONG v. ROBERTSON & BARNWELL.

1. Where a notice is given to a Sheriff, that a motion will be made for a judgment against him for the failure to return an execution, the motion must be made at the time appointed, or some other proceeding must be had to keep alive the notice; otherwise, it will be regarded as having spent its force.
2. Where a notice to a Sheriff, that a judgment will be moved for against him, is found in the transcript sent to the Supreme Court, if it has not been recognized by the judgment, or other entries of the inferior Court, it will be treated as a nullity.
3. *Semble*, although the record does not show that the defendant had notice, that a judgment would be moved for against him, yet, if he appears, the irregularity will be waived.
4. The thirty-sixth section of the act of 1807: "establishing Superior Courts; and declaring the powers of the territorial Judges," and the fifth section of the act of 1824, to regulate pleadings at Common law," are the only statutory provisions in this State in regard to the amendment of judgments. The latter act, which is more explicit, and is, doubtless, intended to confer additional power on the primary Courts, authorises them "to amend any clerical error," &c., "where there is sufficient matter apparent upon the record to amend by." No amendment therefore, which is not authorised by the record is permissible.

In the transcript sent up in this cause, we find a paper addressed to the plaintiff in error, in which it is stated that the defendants recovered a judgment against Benjamin Lang in the Circuit Court of Mobile, on the 21st of April, 1826, for the sum of eleven hundred and sixty seven dollars and ninety cents, besides costs. The paper then proceeds to alledge, that a writ of *fiери facias*, duly issued on that judgment against the defendant, Lang, for the amount of the same, including costs, on the 29th of September, 1831, and was on the 15th of October, thereafter, placed in the hands of the plaintiff in error, as the Sheriff of Lowndes County. It is there stated, that the execution was not returned according to law; and the plaintiff is informed, that the defendants in error, "will, on the fourth Monday after the fourth Monday in March instant, or so soon thereafter as the said Court will hear the motion, move the Circuit Court of Mobile County, for judgment against (him) you in due form of law for such (his) your failure to return the

said execution—when, and where, &c.” This notice is not dated, but immediately following it in the transcript, a memorandum is written thus, “Served 23d March, 1833.”

No proceedings appear to have been had on the notice. At the Spring term, 1836, an entry was made as follows:

ROBERTSON & BARNWELL,	}	Continued by the plaintiff for want of papers.
v.		
F. ARMSTRONG.		

At the fall term, 1836, a case entitled as above was entered on the minutes of the Court, “continued for want of papers.”

The next entry found in the transcript was made at the Fall term, 1838, and is in these words:

ROBERTSON & BARNWELL, Pl’ffs.	}	Continued on affidavit of the defendant.
v.		
FRANKLIN ROBINSON, Def’t.		

At the Spring term, 1839, the following was made on the minutes of the Court.

ROBERTSON & BARNWELL, Pl’ffs.	}	Continued by consent.
v.		
F. ARMSTRONG, Def’t.		

At the Spring term, 1840, a judgment was rendered as follows:

WILLIAM H. ROBERTSON & WILLIAM BARNWELL, Pl’ffs.	}
v.	
FRANKLIN ARMSTRONG, Def’t.	

“This day came the parties by their attornies, and it appearing to the satisfaction of the Court, that a writ of execution issued out of this Court, bearing test the 29th day of September, 1831, and returnable at the next term of this Court to be holden thereafter, in favor of Willliam H. Robertson and William Barnwell against Benjamin Lang, for the sum of eleven hundred and sixty seven dollars and ninety cents, with eleven dollars seventy-one and a half cents costs; and it further appearing to the Court, that Franklin Robinson was at that time Sheriff of

the County of Lowndes in said State, and that said execution was directed to the said Sheriff, and placed in his hands to be executed on the 15th day of October, 1831 ; and it further appearing to the Court by evidence, that the said Sheriff has failed to return the said execution as the Statute requires, or to give any sufficient excuse for the said default. It is considered by the Court, that the plaintiff's recover of the defendant the amount of said execution with interest ; to wit : the sum of twenty-six hundred and ten dollars and seventy-six cents, together with the costs in this behalf expended."

Afterwards, at the Fall term of the Court, 1840, an amended judgment was rendered as follows :

WILLIAM H. ROBERTSON &
WILLIAM BARNWELL
v.
FRANKLIN ARMSTRONG.

} Saturday, 5th December, 1840.

" This day came the plaintiff's by Gordon, Campbell & Chandler, Esqs., their attornies, and also came the defendant by Dunn & Lesesne, Esqrs., his attornies ; and the plaintiff's by their attornies moved the Court to correct the entry of judgment in this cause, at Spring term, 1840. for a clerical error in reciting in the entry of judgment, the name of Franklin Robinson instead of Franklin Armstrong ; which motion being considered by the Court. It is ordered by the Court that the motion of the plaintiff's be granted.

Whereupon, it appearing to the satisfaction of the Court, that a writ of execution issued out of this Court being test the 29th day of September, 1831 ; and returnable at the next term of this Court to be holden thereafter, in favor of Wm. H. Robertson and Wm. Barnwell against Benjamin Lang for the sum of eleven hundred and sixty-seven dollars and ninety cents, with eleven and seventy-one and half one-hundredth dollars costs. And it further appearing to the Court, that Franklin Armstrong was at that time Sheriff of the county of Lowndes in said State, and that said execution was directed to the said Sheriff, and placed in his hands to be executed on the fifteenth day of October, 1834 ; and it further appearing to the Court by

evidence, that the said Sheriff has failed to return the said execution as the Statute requires, or to give any sufficient excuse for the said default. It is considered by the Court that the plaintiffs recover of the defendant the sum of twenty-six hundred and ten dollars and seventy-six cents, together with their costs in this behalf expended, and interest on said debt from the 27th day of March, A. D. 1840."

To revise the original and amended judgments, a writ of error has been prosecuted to this Court, and the plaintiff here assigns for error. *First*, That he had no legal notice of the proceedings against him in the Circuit Court. *Second*, That the proceeding in the Circuit Court was discontinued. *Third*, That the Court erred in correcting the judgment *nunc pro tunc*.

DUNN, for the plaintiff in error.

CAMPBELL, for the defendant.

COLLIER, C. J.—The notice accompanying the transcript, though not dated, was doubtless issued previous to time of its service, and should have been proceeded on at the term then next succeeding. There is nothing in the record to show that the motion, indicated by it, was then made, or at any time thereafter; and as the notice was not brought before the Court, at the term the defendant below was informed that a judgment would be moved for against him, it spent its force, and could not thereafter furnish a warrant for the exercise of jurisdiction." Broughton et. al. v. The State Bank, 6 Porter's Rep. 48; Lyon v. The Bank, 1 Stewt Rep. 442.

Again: the notice sent up with the transcript, does not authorise us to consider it as a part of the record for any purpose. It is not recognized either by the judgment, or previous entries, and must therefore, be regarded as a mere nullity not entitled to any consideration. Lyon v. The State Bank, 1 Stewt Rep. 442; Curry v. The Bank of Mobile, 8 Porter's 372; Bates v The Planters' & Merchants' Bank, 8 Porter's Rep. 99.

The notice then, being out of the way, the proceedings certified in the transcript, previous to the Spring Term of the Circuit Court, 1840, are the statement of a case between the plain-

tiffs below and the defendant, at the Spring and Fall Terms, 1836, "continued for want of papers," and at the Spring Term, 1839, "continued by consent." At the Fall Term, 1838, a case is stated between the plaintiffs below, and Franklin Robinson, "continued on the defendants affidavit." At the time the first judgment was rendered, so far as we are informed by the record, there was no cause pending in Court, and but for the appearance of the defendant, that judgment would have been wholly unauthorized, for the want of a notice. And though the appearance of the parties, and a submission to a decision by the Court, may have authorized the procedure, yet, it is clear, that the judgment is, in itself, erroneous. Taking every fact recited in it as true, yet it does not shew a liability on the part of the plaintiffs—it affirms, that Franklin Robinson was sheriff of Lowndes County, and, as such, was guilty of the default, for not returning the execution, for which it charges the plaintiff.

The irregularity of the first judgment is conceded by the defendants in error, but it is insisted, that it is removed, by the amended judgment, subsequently rendered. In considering this argument, we must inquire into the power of Courts to allow amendments of their judgments. At the common law judgments were amendable, during the term at which they were pronounced, (and not after) because they were regarded as rolls of that term, and so in the breast of the Court, during its continuance, subject to be altered or set aside. [1 Bac. Ab. 145; Commonwealth v. Cawood, 2. Virg. cases, 527; Hall v. Williams, 1 Fairf Rep. 278; State v. Calhoun, 1 Dev. & Bat. Rep. 374; Freeland v. Field, 5 Call. Rep. 12.] And anciently the same strictness prevailed in regard to all the proceedings in a cause; afterwards a more liberal practice was introduced, and amendments were allowed at any time, pending the suit, and until final judgment was entered and enrolled. [Smith v. Jackson, 1 Paine's Rep. 486.] But as the Courts at the common law proceeded with great caution in permitting amendments, rarely going beyond matters of form, and then only where there was something in the record, by which to amend, the purposes of justice required that the liberty should be extended; and it has accordingly been done, both in Great

Britain and this country, by statutes enacted from time to time upon the subject.

The only statutory provisions which we have in regard to the amendments of judgment by the Circuit or County Courts, are the thirty-sixth section of the act of 1807, "establishing superior Courts, and declaring the powers of the territorial judges," and the fifth section of the act, of 1824, "to regulate pleadings at common law," which are as follows "no summons, writ, declaration, return, process, judgment, or other proceedings, in any of the Courts of this territory, shall be abated, arrested, quashed, or reversed, for any defect, or want of form; but the said Courts respectively, shall proceed and give judgment, according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects or want of form, in such writ, declaration, or other pleading, return, process, judgment or cause of proceeding whatsoever, except those only in case of demurrer, which the party demurring, shall specially set down and express, together with the demurrer, as the cause thereof; and the said courts respectively, shall and may, by virtue of this act, from time to time amend all and every such imperfection, defect, and want of form (other than those which the party demurring shall express as aforesaid) or any mistake in the christian name or surname of either party, sum of money, quantity of merchandize, day, month, or year, in the declaration or pleading, the name, sum or quantity, or time, being right in any part of the record or proceeding." &c.

Again: "The Circuit and County Courts respectively, shall and may at any time within three years after final judgment, upon the application of either party, amend any clerical error, or misprision, in calculation of interest, or other mistake of a clerk, where there is sufficient matter apparent upon the record to amend by; and no cause shall be reversed for any such error or defect, by the Supreme Court, unless the Court of original jurisdiction, where the same was determined, shall, upon application, refuse the amendment." [Aik. Dig. 265. 6.]

The act of 1807, declares that judgment shall not be reversible for "any defect or want of form," but such judgment shall be rendered "as the right of the cause and matter in law"

shall require, "without regarding any imperfections," &c. This statute authorises the process and pleading to be amended, but says nothing in regard to the amendments of judgments; but this, as we have seen, is provided for by the act of 1824.

The latter act authorises "the Circuit and County Court respectively," to "amend any clerical error," "where there is sufficient matter apparent upon the record to amend by." In the case before us, without admitting that the mistake in the first judgment was a "clerical error" it has been already shewn, that there is nothing in the record, by which it could have been amended. The notice sent up, we have seen, is no part of the record, and none of the entries transcribed from the minutes of the Court characterize the plaintiff as a sheriff. The amendment then, was unauthorized; and such has been the construction of a similar statute in other states. [Waldo v. Spencer, 4 Conn. Rep. 71; Atkins v. Sawyer, 1 Pick. Rep. 351; Speed v. Hawn, 1 Mour. Rep. 19; People v. McDonald, 1 Cow. Rep. 189.

The judgment of the Circuit Court is reversed, and, as the *present case* cannot be further proceeded in, the cause will not be remanded.

WEATHERFORD, ET ALS. v. JAMES.

1. When a vendor sells a greater interest than he has in the land, or knowingly sells a defective title, if the vendee is willing to take such title as he has, or such portion of the subject of the contract as he can control, a Court of Chancery will decree a specific performance to that extent.
2. But where the contract is not to convey the fee absolutely, but on a contingency, which has not happened, the vendee is not entitled to insist on the conveyance of a less estate, and an abatement of the price.
3. Where a vendee stipulates that, in the event he is not able to make a title in fee to the land, he will execute a mortgage on certain slaves, a Court of Chancery

will not decree a conveyance of the land, unless the party is unable to comply with the alternative contract.

4. A decree is final, which settles the rights of the parties, although there be a reference to the master to compute damages, &c.

Error to the Chancery Court at Monroeville.

THIS was a bill in Chancery, filed by the defendant in error, against Margaret Tait, Downey and wife, and Newman and wife, for a specific performance of a contract, entered into by Newman with the defendant, by which he agreed to sell the interest of his wife, an Indian woman, in a tract of land which the plaintiffs in error were said to have acquired by the treaty of Fort Jackson, and an act of Congress passed in 1817.

The contract of Newman, which is set forth at large in the opinion of the Court, was to sell the interest of his wife in the land, provided he could obtain the passage of an act of Congress authorizing him to do so; and on his failure to obtain such act, that he would execute a mortgage on certain slaves, to secure the repayment of the purchase money.

The act of Congress was never passed; and his Honor, the Chancellor, having decided that Newman was a tenant by the curtesy on the bill, answers, and proof, decreed that the complainant was entitled to such estate as Newman could convey,—that partition be made between the defendants, and directed an inquiry to be made by the Master, whether the complainant had been evicted by the defendant, of the possession of the lands, by a judgment obtained at law, and also, whether any damages had been paid by the complainant on the judgment at law. The decree also directed the Master to ascertain the value of Newman's estate, estimating the fee at eight hundred dollars; and ordered the costs to be taxed against the defendants.

From this decree, this writ of error is prosecuted.

PECK, for plaintiffs in error, cited 4 Porter, 153; 1 Schoales & Lefroy, 119; 13 Peter's Rep. 6; 1 Morroe Rep. 133; Har. Chan. 500; 12 Johns, 508.

PORTER, contra, cited Minor's Rep. 13, 101, 117, 184; 7 Porter, 41; 8 *ibid* 558; Aik. Dig. 246; Lube. Eq. 118; 1

John's Chan. 85; 6 Peters' 763; 16 Pick. 162, 165; 1 Lomax Dig. 215, 242; 1 Story's Eq. 384; 1 John's C. 566; 2 *ibid*, 158; 10 Vesey, Jr. 260, 314; 7 *ibid*, 474; 8 *ibid*, 506; 9 Johns' 450, 463.

ORMOND, J.—This case has been elaborately and ably argued on both sides, upon the construction to be put on the treaty of Fort Jackson, and the act of Congress of 1817, in relation thereto, by virtue of which, the land in this case is supposed to have been acquired.

We are however relieved from the necessity of considering these questions, by the view we take of the bond, executed by the defendant, Alger Newman.

The bond which is the foundation of this proceeding, was executed by Newman, on the eighteenth July, 1832, to the defendant in error, in the penal sum of sixteen hundred dollars. The condition of the bond recites, that Newman in right of his wife, and by virtue of the treaty of Fort Jackson, is possessed of the legal claim, to the undivided third part of a tract of land, which is described, and said to contain four hundred and forty-nine and a half acres, which Newman, in consideration of four hundred dollars, which he acknowledges to have received, and of the same amount; to be paid afterwards, is desirous to transfer in fee simple; but is now prevented from doing so by the treaty of Fort Jackson: he therefore agrees, that he will use his best endeavors to obtain, under a law of Congress, as soon as possible, the right to dispose of and sell the said tract of land; and should he obtain the said law, he will forthwith convey the same, in fee simple, to the said James. He further agrees that, in the event, he cannot obtain such a law, then he will on the first of March, 1833, or previously, secure by mortgage, one good sound and healthy negro woman and children, of value equal to the penalty of the bond. It is further stipulated that, if the heirs and descendants of Newman convey to James their respective interests in the land, as soon as by the treaty they are authorized to do so, then James agrees to relinquish to each of them respectively, a corresponding proportionate share of the mortgaged property.

This bond is executed by Newman alone, James being no party to it.

The chancellor decreed, that the contract should be specifically performed, so far as Newman was able to perform it; and, having decided that he was a tenant by curtesy, and that James was entitled to that interest, ordered a reference to the master, to ascertain the value of that estate, estimating the fee at eight hundred dollars.

The law of Congress, here spoken of by the parties, never having been passed, and the defendant not being able for that reason to make, or cause to be made to the complainant a title in fee simple, the chancellor decreed, that he should convey the estate he had in the premises.

There is doubtless a numerous class of cases, in which Courts of Chancery have decreed that the vendee, if he elected so to do, might take a defective title, but on examination, it will be found, that these cases turn on the fact that the vendor either undertook to sell a greater interest than he had, or that he knowingly sold a defective title. In such a case, if the vendee is willing to take the title, such as it is, or such portion of the subject of the contract as he can control, it does not lie in his mouth to say that the contract shall not be performed, as far as he has power to perform it. Thus, in the case of *Mortlock v. Buller*, 10 Vesey, Jr. 315. Lord Eldon says "I also agree, if a man, having a partial interest in an estate, chooses to enter into a contract respecting it, and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances, is bound by the assertion in his contract; and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the Court will not hear the objections by the vendor, that the purchaser cannot have the whole." [See also *Lawrenson v. Butler*, 1 Schoales & Lefroy, 13.]

In this case there was no attempt to impose on the complainant by Newman; both parties appear to have understood the situation of the land; they were contracting about. The com-

plainant desired to purchase the fee in the land, and Newman contracted to sell it, provided an act of Congress could be obtained authorizing the sale. This was supposed by the parties to be necessary, as the land was acquired by the grantees as descendants of Indians, under the treaty of Fort Jackson; and there was a difficulty, real or supposed, as to the right of the grantees to alienate the land thus acquired. As no such act was passed, authorizing Newman or his wife, or both jointly, to convey the title, and as the fee is not, and never was in Newman, it is obvious, that he has no power to convey the fee. But this contract was not to convey the fee absolutely, but only on a contingency which has not happened. The right of the complainant to call on Newman for the title, has never existed. The case then bears no resemblance to those in which the vendor has been required to execute the contract *cy pres*. In that class of cases the vendor is estopped from saying that he cannot make title to the whole, by his contract to that effect; and if the purchaser is willing to take such title as the vendor can make, there does not appear to be any valid objection to it. But that is not this case; and it would be going great lengths for a Court of Chancery, to say that a purchaser should have that which he did not contract for, when the vendee is not to blame, because he did not get that which he really did contract for. In the case of *Wheatly v. Slade*, 4 Simon's 126, the vendors had agreed to sell a lace manufactory, under the impression they were the entire owners, when in fact, they owned but nine-sixteenths of it, on which was an encumbrance of ten thousand pounds. The Vice Chancellor refused to grant a specific performance, because the encumbrance would exhaust nearly the whole purchase money.

There is still another feature in this case. It was agreed between the parties that, if Newman was not able to convey the the land, he should execute a mortgage on certain negro slaves; it appears therefore, that the parties agreed themselves on the alternative compensation, if the contingency, on which the conveyance of the land was to be made, did not happen. In such a case, a Court of Equity would not, even in a case proper for a specific performance, make such a decree, unless there was a specific ground for the interposition of a Court of Equity; as

for example, that the party was not able to perform the alternative contract. We are aware that the mere circumstance, that a *penalty* is provided in the contract, will not prevent the Court from directing a specific performance; but that is not like the case of an alternative undertaking to do a specific act as in this case.

We are therefore of opinion, that, as Newman did not contract absolutely to convey the title, but only on a contingency which has not happened, this Court has no power to direct that he shall convey a less estate, admitting it to be true, that he has such an estate in the lands, as the Chancellor supposes.

We have not thought it necessary to enquire, whether there is any mutuality in the contract, it not being executed by the complainant, as the view already taken satisfactorily disposes of the cause, if the complainant was equally bound with Newman in the contract.

It is further alledged by the defendant in error, that the decree in this case is not final; and that for this cause, the writ of error must be dismissed. As no writ of error can be prosecuted to this Court, but on a final judgment or decree, except in the case of the dissolution of an injunction, as provided for by the statute, we proceed to enquire what is the character of the decree in this case.

The decree ascertains that the complainant is entitled to a specific performance of the contract, and settles the rights of the parties, so far as to declare that the complainant is entitled to the possession of the land, and to such estate as Newman had in it. A reference is made to the Master to ascertain the difference in value, between the estate which Newman took as tenant, by the curtesy and the fee simple title, estimating the latter at eight hundred dollars. It is further ordered, that a commission issue to commissioners to make partition of the estate. And, as two of the defendants had obtained a judgment against the complainants, for the land in question, an enquiry is directed to ascertain this fact, and also whether any damages have been recovered at law, and to what amount; and costs are given against the defendants, except those which

may accrue on the partition, of which the complainant is to pay one third.

If a decree is final, when it ascertains all the rights of the parties in litigation, then this is a final decree. The acts which are to be done, as the decree points out the mode, and settles the principles by which these acts are to be regulated, are in their character, ministerial; subject, to be sure, to the control and supervision of the Chancellor. The decree in this case, even settles the question of costs, and leaves nothing to be done in future, but to carry into effect the principles settled by the decree. If the reference to the Master had been for the purpose of ascertaining some fact, on which to base a decree affecting the rights of the parties, it would be interlocutory in its character. No conceivable object could be attained by a contrary decision, which would only promote litigation and expense.

In the case of Traver's, and others v. Waters, and others, 12 Johns. Rep. 500, a decree almost precisely similar to this, was held a final decree. See also Harrison's Practice, 622; 1 Monroe Rep. 137; 13 Peter's Rep. 6; and 3 Cranch, 179. Such it may be added, has hitherto been the practice of this Court.

The decree of the Court below, therefore, is reversed; and this Court, proceeding to render such decree as should have been rendered, dismiss the bill, but without prejudice to any action which the complainant may think proper to prosecute on the bond of Newman.

FOSTER, NOSTRAND & CO. v. WALKER.

1. A garnishee must be discharged, if no issue is formed on his answer, when he answers that he was once indebted to the defendant by certain notes, three of which are outstanding and unpaid; but as to one, that he was notified by J. E. S. & Co., before the service of the summons, that it was held and owned by them, and on which they had commenced a suit against him; and as to the other two, that he had been notified, since the service of the summons, by C. & A. B., that they were held and owned by them, previous to the service of the summons.
2. A garnishee is not required to determine the validity, or the fact, of an assignment. He may state that he has been notified by a holder of the assignment to him of the note, and it rests with the plaintiff to contest the *factum* of the assignment, by an issue under the statute.
3. The suppletory oath, required by the statute to be made by the plaintiff, before an issue can be had on the answer of a garnishee, may be made by an attorney, agent, or factor.
4. When the answer of a garnishee admits outstanding notes, given to the defendant, but, that notice has been given of their assignment to other parties before the service of the summons, the oath of an attorney in fact of the plaintiff, that he believes the assignment, if any was made, was made subsequently to the service of the summons, is sufficient to put the answer of the garnishee in issue.

Appeal from the Circuit Court of Mobile County.

ACTION of assumpsit commenced by attachment in June, 1837, at the suit of Foster, Nostrand & Co., against Bard Meslier. The attachment was served on certain lands, and Daniel Walker summoned as garnishee on the 2d September, of the same year. At the Spring term, 1838, Walker, the garnishee, appeared in open Court, and answered the garnishment, as follows: "That on or about the 12th day of October, 1836, he made and executed to the said Meslier, his four promissory notes of about the said date. One for two thousand dollars, payable ninety days after date; one for two thousand dollars, payable six months after date; one for the sum of twenty-one hundred and forty dollars, payable twelve months after date; the other for the sum of twenty-two hundred and ten dollars, payable eighteen months after date. The first of which notes, he paid to Meslier at the maturity thereof; the second of which

notes, he had been notified by Joseph E. Sheffield & Co., before the notice of the service of garnishment, was held and owned by Joseph E. Sheffield & Co., and that the said Joseph E. Sheffield & Co., had commenced suit against him on the same ; the third, and last of which notes, he had been notified, since the service of said notice, by C. & A. Batre, were held by them before said notice, are held and owned by C. & A. Batre, and said C. & A. Batre had commenced suit against him on the third of said notes. All of which sums mentioned in these last mentioned notes, he was ready and willing to pay as the Court might direct."

After this answer was received; "John N. Mott, the attorney in fact of the said plaintiffs, appeared in open Court and made affidavit, "that the said promissory notes, thirdly and fourthly rendered in the answer of the garnishee were not transferred as set forth in the said answer, at the time of the service of the said summons of garnishment; whereupon, it was ordered by the Court, that an issue be made up by the said plaintiff, and the said defendant, in pursuance of the statute, to be tried at the next term of the Court." Such are the recitals of the entries. The affidavit of Mott appears in the transcript, and it alleges, "that at the time of the service of the summons of garnishment in this case on the said garnishee, the affirmant was not apprized, nor had he any knowledge or belief, that the promissory notes, of the said Walker, thirdly and fourthly mentioned in the answer of the said garnishee, had been transferred, or became the property of any third person; neither had the affirmant any ground to believe, that any such transfer had been made at the time of such service, other than mere verbal declarations recently made to the affirmant, by the parties directly interested in establishing the fact of such transfer. And he does believe, that said transfer, if any, was made subsequently to the said service of garnishee." Whereupon he prays that an issue may be formed according to law."

At the Spring term, 1840, the plaintiffs had judgment against Meslier, the defendant in the attachment for three thousand six hundred and seventy-nine dollars. At the same term the plaintiffs moved the Court, to order a notice to issue to Adolphus Batre, surviving partner of the late firm of Charles &

Adolphus Batre, the assignees named in the defendant's answer. This motion was overruled; at the same term, the defendant moved the Court to strike out the affidavits of the plaintiffs' attorney in fact, and discharge the garnishee, which motion was granted and Walker discharged.

The plaintiffs therefore, prayed an appeal to the Supreme Court, which was allowed, and now assign as cause for reversal.

1st. The refusal of the Court to order the notice to Batre.

2d. The order of the Court, that the affidavit of Mott should be stricken out.

3d. The discharge of the defendant from the garnishment.

ADAMS, for the plaintiff in error, abandoned the first assignment, as the act of the 5th February, 1840, has only a prospective operation. As to the other assignments, he insisted, that the affidavit of Mott traversed the answer of the garnishee, in the only manner possible—that of not denying the indebtedness to Meslier, in express terms. His liability to C. & A. Batre is not stated or admitted, but is only inferable from the fact of transfer of the notes to them *before* the service. Now this transfer is deemed bad; therefore, the indebtedness is to be inferred.

If the answer of Mott was properly stricken from the files, yet the garnishee ought not have been discharged, because he admits his indebtedness, and shows no fact which discharges it. He does not say that the notes *were* assigned to Batre, but only, that he has been *so informed*. This information comes after the service of the garnishment, and from them, who are interested to give it. It is not like a notice of assignment given before the plaintiff's right had attached. [11, Mass. 491, 4 *ibid.* 450. 3 *ibid.* 358.

CAMPBELL, *contra*, cited Colvin v. Rich, 3 Porter's Rep. 175; Simpson & Gordon v. Tippen, 5 S. & P. 208.

GOLDTHWAITE, J.—1. It has hitherto been considered, as well settled in this Court, that, to authorise a judgment against a garnishee, his answer must contain a distinct admission of a legal debt due, or to become due, to the defendant in the original suit. Allen v. Morgan, [1 Stewart 9,] Prissall v. Mabry,

3 Porter, 105 ; Smith v. Chapman, 6, *ibid.* 365. In this case the answer does not expressly deny the indebtedness, which it admits once existed, but it states that the garnishee has been informed of a fact, which, if true, transfers his indebtedness to another.

2d. There would be a peculiar hardship imposed on the garnishee, if he was obliged, at his peril, to determine whether the information received by him in such a case as this, was true or false. Indeed, he has no means by which he can attain the information necessary to enable him to swear to the certainty of the fact. It is enough, that the answer does not admit a present indebtedness. The statute allows the plaintiff to contest the answer, and to have an issue formed to ascertain, whether the fact put in issue, is true, or otherwise. If the case stood on the answer of the garnishee, he would be entitled to his discharge, according to rules laid down or recognized in the cases cited.

3d. Whether the issue was properly formed in this case depends on the construction of the 25th section of the act of 1833. [Aikin's Digest, 43.] which is in these words: "The plaintiff wishing to controvert the garnishee's answer, may do so by making oath, that he believes the same to be incorrect; whereupon, an issue shall be formed, and tried as in other cases."

The terms used, would seem to indicate that the oath should be made by the plaintiff in person, but the previous sections authorise an attachment to be sued out by an agent, attorney or factor; and it would be unreasonable to suppose, that greater strictness was intended to be imposed on a collateral issue, than is required in the original process; as the statute is not to be rigidly construed, (as declared by its 17th section,) we think, the suppletory oath may well be made by any person, who is authorised to sue out the attachment.

4th. Then, as to the form and substance of the affidavit of the attorney in fact, at first view, it would seem to be very indistinct; but examined, it will be found not to be so, when considered in connexion with the answer. The fact to be controverted, is the discharge of Walker's liability to Meslier the defendant, and the transfer of the indebtedness by the assignment of the note, to C. & A. Batre. Now, on looking into the

answer of the garnishee, we find, that it does not assert either, that Walker has discharged his indebtuness to Meslier, or that a transfer has been made of the notes, to C. & A. Batre, before the service of the garnishment.

It does assert, however, that the garnishee was *informed after* the service, that the notes had been transferred *before*. This assertion is probably true; but yet the fact of an actual transfer, may never have existed; and, without such a transfer, the liability of Walker to Meslier, would continue. The affidavit of the attorney, very properly, in our opinion, puts the transfer in issue, and in the spirit, at least, if not the words, of the statute, states the belief of the attorney, that the statement of the transfer is incorrect. We think the Circuit Court erred, in striking out the affidavit of the plaintiffs' attorney in fact, and consequently, in discharging the garnishee, without a trial of the issue. It may be added, that this view withdraws the case from the influence of the decision, in *Simpson & Gordon v. Tippen*, 5 S. & P. 208, as the plaintiffs cannot enquire, under this issue, whether the notes were fraudulently transferred to C. & A. Batre; but it only puts in issue the *factum* of the transfer, previous to notice of the garnishment.

Let the judgment be reversed, and the case remanded.

BARNETT v. STANTON & POLLARD.

1. To entitle the vendee to recover for a defect in the quality or soundness of the property sold, except under special circumstances, he must shew either a warranty, or that the seller concealed, or fraudulently represented, its qualities.
2. No form of words is necessary to constitute a warranty. A bare representation or assertion, if so *intended and understood* by the parties, will amount to a warranty; but, though the representation of the seller be positive, it will be regarded as an expression of his belief or opinion, unless it was *intended and received* as a stipulation, that the quality of the property was such as it was represented.

3. *Quere*—on the sale of an article of merchandize, will the law imply a warranty, that it is merchantable, or fit for the purpose for which it was sold and purchased? *Semble*—that such a warranty has never been implied, where the article was open to the inspection of the vendee before the purchase.
4. Fraud will not be implied from the mere falsity of a representation—it is necessary to shew, that the representation was made with a knowledge by the vendor, that it was untrue, or under circumstances manifesting a recklessness of truth, without knowing whether it was true or false.
5. The mere omission of the seller to disclose a fact within his knowledge, which would materially affect the value of the article, is not a fraud upon the vendee—to make it such, there should be a fraudulent suppression.
6. An offer to return in a reasonable time after the breach of a warranty by the vendor, or the discovery of a fraud practised by him on the vendee, will be as effectual to rescind the contract, as if the offer had been accepted.
7. A vendee, who would rescind a contract for breach of warranty or fraud, must act with promptness, and take the legal steps for that purpose, as soon as the breach or fraud is discovered. If the vendor resides at a distance from the vendee, an offer to return a chattel, may be made through the medium of the *post-office*.
8. A contract cannot be rescinded, without mutual consent, where circumstances have been so altered by a past execution, that the parties cannot be put *in statu quo*.
9. Where the vendee does not rescind the contract upon the discovery that the vendor has committed a fraud, he cannot avoid the payment of the purchase money, *in toto*—the deduction, if any, can only be to the extent of the injury which the vendee has sustained by the fraud.

THE plaintiff brought an action of *Assumpsit* against the defendants in the Circuit Court of Mobile, on a promissory note, dated the 31st January, 1838, for the payment of thirteen hundred and thirty and thirty-five one-hundredths dollars, six months thereafter. In the transcript there is no plea, but the case was tried by the jury as on issue joined.

On the trial, the defendants excepted to the ruling of the Circuit Judge. From the statement of the facts in the bill of exceptions, it appears, that the note sued on, and others, were given in consideration of a lot of ready-made clothing, which the plaintiff sold to the defendants in the City of Mobile, about the day of its date. Some of the witnesses testified, that the sizes of the different pieces did not correspond with the marks on them, and one of them stated, that the difference was so great, he was of opinion, that the disagreement proceeded from an intention to defraud. One of the witnesses proved, that the plaintiff represented the clothing to be fresh, well made, and suitable for

the market. It was also shown, that the plaintiff and defendants were negotiating about three weeks—that, while the negotiation was pending, the defendants frequently called and examined the clothing, and that the purchase was not made until after repeated and careful examinations. About one-half of the clothing had been sold by the defendants at considerable loss—the remainder still being on hand.

The plaintiff, as well as the defendants, were “professed dealers in ready-made clothing.” There was a want of proof to shew, that the plaintiff was aware, at the time of the sale, of the want of correspondence between the marks and the clothes, or that he had other means than the defendants had, of ascertaining that fact—having himself purchased them at the North.

On these facts, the plaintiff’s counsel moved the Court to charge the jury—

1st. The suppression of a fact equally open to both parties, and which the defendants, by reasonable, diligence might have ascertained, is no fraud, so as to discharge him from the contract; and that, to entitle the defendants to avoid the contract, he must prove a fraudulent representation, as to some material fact, which he could not by reasonable diligence ascertain.

2d. That the representation that the goods were fresh, if they were afterwards submitted to the examination of the defendants before the sale, was not such a fraud as would enable the defendants to defeat the action.

The first prayer was refused, and in answer to the second, the Court, chargged the jury, “that the representation that the goods were *fresh*, if they were afterwards, and before the sale, submitted to the examination of the defendants, was no fraud, if they were not in fact fresh.”

The Court charged the jury further, that, if there was a warranty in this case of the quality of the goods, and they did not correspond with such warranty of quality, the defendants were entitled to set-off whatever loss they may have sustained, by reason of the goods not answering to the warranty. That a warranty might be either express or implied—that whatever representations a party makes as to the quality of an article sold at the time of sale, is an implied warranty that the article is of

the quality represented. That, if the plaintiff made a false representation of the quality of the goods sold, knowing it to be false, it would defeat the action *in toto*. That fraud might be either express or implied; and that fraud might be implied from the fact, that a false representation was made as to the quality of the goods. That the concealment, by the plaintiff, of any fact within his knowledge, is in a law a fraud. That there may be fraud, as well in the suppression of the truth, as in the suggestion of a falsehood—and, if the plaintiff was guilty of a fraud in regard to his representations of the quality and value of the goods, it would defeat the action.

The jury returned a verdict for the defendants, and judgment being rendered thereupon, the plaintiff has prosecuted a writ of error to this Court.

DUNN, for the plaintiff.

CAMPBELL, for the dependant.

COLLIER, C. J.—In *Ricks v. Dillahunt*, 8 Porter's Rep. 133, we considered, somewhat at length, the nature of a contract for the sale of personal chattels, and the obligations and duties mutually enjoined upon the vendor and vendee. In that case, we say that, "to entitle the purchaser to recover for any defect in the quality, or soundness of the article, or property sold, except under special circumstances, he must prove that the seller warranted the thing sold, to be good and sound, or that he concealed or fraudulently represented its qualities." (See also, *Ross on Vendors*, 334; *Hyatt v. Boyle*, 5 Gill & Johns. Rep. 110; *Chitty on Con.* 4 Amer. ed. 356, *et post*. In order to constitute a warranty, no particular form of words is necessary—the word *warrant* need not be used. A bare representation or assertion as to the quality of the property, if so *intended and understood* by the parties, will amount to a warranty. But no matter how positive the representation of the seller may be, it will be regarded as an expression of his belief, or opinion, unless it was *intended and received* as a stipulation, that the property was of the quality represented. (*Chitty on Con.* 4 Amer. ed. 358, *et post*. *Ricks v. Dillahunt*, 8 Porter's Rep. 133, and cases there cited.)

The cases in which the vendor will be liable for a defect of quality, where there is neither an express warranty, nor a fraud, are those, where, from the nature of the transaction, the law will imply a warranty. These are exceptions to the rule of *caveat emptor*—some of them are noticed in the case of *Ricks v. Dillahunty*; but, as the facts of this case do not bring it within either of the qualifications there stated, we must enquire if there be any other exception applicable to them. In *Gallagher v. Waring*, 9 Wend. Rep. 20, which was an action for a breach of warranty on the sale of cotton in bales, the plaintiff insisted that, as the cotton was not in a condition to be inspected, previous to the sale, the vendor impliedly stipulated that it was merchantable. The Court thought it was competent for the plaintiff to shew, that the cotton was not of a good merchantable quality or condition: “as on a purchase without an opportunity for inspection by the vendee, the law implies a warranty by the vendor to this extent, whether the vendee has had an opportunity of inspection or not. Under such circumstances, it would be as absurd to permit a vendor to fulfil his contract by delivering an article, of the kind contracted for, of no value, as it would be to permit him to fulfil it, by delivering an article of a totally different kind.” In that case, it was difficult, if not impossible, to ascertain the quality of the cotton by drawing of samples, as the “bales had been fraudulently packed in the interior of them with old, dry, and damaged cotton.” And, in *Hyatt v. Boyle*, 5 Gill and Johns. Rep. 110, which was an action for the sum agreed to be paid for *twenty-four* kegs of tobacco, it was argued for the plaintiff, that a warranty of merchantable quality was implied, from the difficulty of inspection. But the Court said, that this exception to the general rule of *caveat emptor*, does not apply to cases circumstanced like the present; but to those, where the examination at the time of sale, is, morally speaking, impracticable—as where goods are sold before their arrival or landing. The mere fact of the inspection being attended with inconvenience or labor, is not equivalent to its impracticability. If the purchaser desire to avoid it, and yet obtain the protection it would afford him, he must do so by exacting from the vendor an express warranty of quality.” In *Hart v. Wright*, 17 Wend. Rep. 274, the case of *Hyatt v. Boyle* is

commented on, and the opinion expressed, that the law in respect to the examination of an article sold, in order to protect the purchaser, where there is neither an express warranty or a fraud, is not laid down with too much strictness.

Some of the later English decisions, certainly give countenance to the more extended doctrine of the civil law, that, on the sale of an article, there is an implied warranty that it is merchantable, or fit for the purpose for which it is sold and purchased. Without attempting to enquire, whether this exception to the general rule, as stated in *Ricks v. Dillahunt*, can be maintained upon *common law* principles, it is enough to say, that the exception has never been allowed to operate, where the article or commodity was open to the inspection of the vendee before his purchase. In the case before us, the negotiation was pending for three weeks, and, in the language of the only witness who testified to the point, "the purchase was not in fact made, until after frequent and careful examinations were made." Upon the evidence then, there is no pretence for saying, that the defendants in closing the bargain, depended upon the superior judgment, or the more accurate knowledge of the plaintiff.

It does not appear, that the plaintiff was aware of the disagreement between the clothing and the marks, or that he had means of ascertaining that fact, which were not alike accessible to the defendants. The plaintiff, though accustomed, like the defendants, to deal in clothing, was not the manufacturer of the lot in question. (See *Chitty on Con.* 4 Amer. ed. 357-8; *Gray v. Cox*, 4 Barn. & Cres. Rep. 108; *Gallagher v. Waring*, 9 Wend. Rep. 20; *Hart v. Wright*, 17 Wend. Rep. 267; *S. C.* 18 Wend. Rep. 449; *Waring v. Mason*, *ibid.* 425; *Parkinson v. Lee*, 2 East's Rep. 314.)

The facts set out in the bill of exceptions, do not seem to have been regarded by the jury, as amounting to a warranty of size and quality, or they would doubtless have found a verdict for the plaintiff, for so much as the clothing was worth, in obedience to the instructions of the Court; but they must have imputed fraud to the plaintiff, and consequently, being charged that the contract was void in that event, and the defendants not liable, they returned a verdict in their favor.

A fraud cannot be implied from the mere falsity of a representation as to quality. It is necessary to shew, that the representation was made with a knowledge that it was untrue, or under such circumstances as manifested a recklessness of truth, without knowing whether it was true or false. An assertion of value, though untrue, if no warranty is intended, does not entitle the purchaser to relief; such assertion is regarded as matter of opinion, not knowledge, in which men may differ. If the seller represents what he believes, as to the value or quality of an article, and leaves the determination to the judgment of the buyer, there is neither fraud nor warranty in the case. (Kent's Com. 2 vol. 1 ed. 381.) It has been said that, in *general*, a representation *though false*, will not afford the party to whom it was made, an opportunity of vacating the contract, if such representation was not *fraudulent*, and formed no part of the contract. (Chitty on Con. 530.) And it has been laid down, that, in order to sustain an action for a false representation, "fraud and falsehood must concur." (Ashlin v. White, Holt's Rep. 387.) But the law will infer fraud, when it is shewn, that what the defendant asserted was false within his own knowledge, and occasioned a loss to the plaintiff. (Foster v. Charles, 6 Bing. Rep. 396-7; Bing. 108; Corbet v. Brown, 8 Bing. 433; Polhill v. Walter, 3 B. & Adol. Rep. 122. See also, Ross on Vendors, 334; *et post*.)

The mere omission of the seller to disclose a fact within his knowledge, which would materially affect the value of the article, is not a fraud upon the vendee. There should be a fraudulent suppression to make it available. The expounders of ethical science hold it to be the duty of the seller to disclose defects which are within his knowledge; but the common law is not so strict in its requirements. If the defects in the article sold, be open equally to the inspection of both parties, the law does not require the vendor to assist the observation of the vendee; it is enough, if he does nothing with an intention to divert the eye, or obscure the observation of the purchaser. There is no breach of implied confidence, if one party profits by his superior knowledge of facts and circumstances, observable by both parties, or equally within the reach of their ordinary diligence, because neither party reposes in any such confidence,

unless it be specially tendered or required. The common law abhors fraud, but it does not go the length of giving indemnity against the consequences of indolence, or a careless indifference to the ordinary and accessible means of information. (Chandelor v. Lopus, Cro. Jac. Rep. 4. Kent's Com. 2 vol. 1st ed. 377.) In Mellish v. Motteux, Peake's N. P. Rep. 115, Lord Kenyon held, that the vendor of a ship, sold "*with all faults*," was bound to disclose a latent defect known to himself, and which it was impossible for the vendee to discover; but Lord Ellenborough, in a subsequent case, decided, that a vendor is not liable, under such circumstances, unless it can be shewn, that he has used some artifice for the purpose of concealing the defect from the vendee. (Baglehole v. Walters, 3 Camp. Rep. 154. To the same effect, see Pickering v. Dowson, 4 Taunt. Rep. 779.)

Comyn in his treatise on contracts, lays down the law in very general terms: "it is a rule" says he "that each of the contracting parties is bound to disclose faithfully to the other, all material circumstances within his knowledge, respecting the subject matter of the contract; and if this be omitted either from design, neglect, or accident, the contract is void." [1 Vol. 2 Am. Ed. 38.] The adjudged cases, do not however sustain the author. An omission to state all the defects of an article, from forgetfulness, or other cause, quite as excusable in a moral point of view, would not make the seller liable for a breach of warranty; and certainly it would not amount to a fraud in fact. The author concedes "that the rule only applies to cases of concealment of material circumstances, which are exclusively within the knowledge of one of the contracting parties." But even to this extent, it cannot be admitted, without introducing the civil law rule, which implies a warranty of title and soundness, from the fact that a sound price was paid. A mere negligent, or accidental omission by the seller, to disclose some defect of the article sold, is not a fraud; because there is wanting the intention to deceive. The law upon this point, may, we think, be thus laid down; the vendor is not bound to disclose defects, which are open to the observation of both parties, but if he designedly conceals, such as

are not thus visible, but rests exclusively within his own knowledge, the vendee may disaffirm the contract.

An offer to return the chattel in a reasonable time, on the breach of a warranty, or where a fraud has been practised on the purchaser, is equivalent in its effect upon the remedy, to an offer accepted by the seller, and the contract is rescinded. But the vendee in such case, must act with promptness, and upon discovering that the subject-matter, is not such as was contemplated, he must offer to return it. [McMillion v. Pigg & Marr, 3 Stewart's Rep. 168-9.] It will not excuse the failure to offer to return, that the vendor lived at a distance from the vendee, or in another State, if his residence was known. A proposition to that effect, communicated though the medium of the Post-office, is equivalent to a personal offer to return, and secures to the vendee every benefit resulting from it. But a contract cannot be rescinded, without mutual consent, where circumstances have been so altered by a past execution, that the parties cannot be put *in statu quo*, for if it be rescinded at all, it must be rescinded *in toto*. [Hunt v. Sylk, 5 East's Rep. 449.] If the vendee neglect to return goods, immediately upon discovering a breach of warranty, or fraud, but keep them and treat them as his own, by putting them up to sale, or exercising other acts of ownership over them, he cannot afterwards reject the contract. Parker v. Palmer, 4 B. & A. Rep. 387; Grinaldi v. White, 4 Esp. Rep. 95; and in Hopkins v. Appleby, 1 Starkie's Rep. 477, it was held, that a soap-boiler, who had used *barilla* sold to him, and warranted to be of a particular quality, for eight successive boilings, without complaint, could not object to the quality in an action for the price. [See also Bluett v. Osborne, 1 Starkie's Rep. 384.] We do not cite Hopkins v. Appleby, because we approve the principle decided by it, but merely to show, that if the purchaser would disaffirm a contract, he must act promptly.

In Burton v. Stewart, 3 Wend. Rep. 236. it was decided, that fraud in the sale of a chattel, cannot be set up in bar of a recovery of the amount of a note given on such sale, unless the vendee on the discovery of the fraud, return the articles purchased to the vendor, or show it to be entirely destitute of value. If the vendee retain the property, he cannot treat the

sale as void. We decline, however the consideration of this point, as it is not essential to a decision of the cause.

The notion that fraud is so utterly destructive in its character, that a contract tainted with it, cannot acquire validity, though tacitly acquiesced in, or assented to, by the parties, is at variance both with reason and authority. We have seen that fraud authorizes the party overreached by it, to rescind the contract, but if he does not do this, he can certainly do no more, than resist the payment of the purchase money to the extent of the injury he has sustained. If he retains the property, he must pay its value, at least. The Circuit Court instructed the jury that, though the contract was continuing, a fraudulent representation of the quality and value of the clothing "would defeat the action." In this, it is believed there is error, as well as in several other points decided in the charge—but as they will be readily discovered by a comparison of the bill of exceptions with this opinion, we deem it unnecessary to recapitulate. We have only to add, that the judgment is reversed and the cause remanded.

EMANUEL & GAINES v. HUNT.

1. In the case of a debt secured by a mortgage on property, the debt is the principal, and the mortgage merely an incident—an assignment of the debt therefore, is an assignment of the mortgage also, unless otherwise, expressed in the transfer.
2. An allegation in a bill, that the note was assigned, is equivalent to an allegation, that the mortgage was assigned, also.

Error to the Chancery Court at Mobile.

THIS was a bill filed in the Chancery Court at Mobile, by the defendant in error against the plaintiffs in error to foreclose a mortgage.

The bill charges that the defendants in error, were indebted to James Magee, Calvin Norris, and Thomas McCoy, in three promissory notes for upwards of fifteen thousand dollars each, due at the periods stated in the bill; to secure the payment of which, a mortgage was executed by the plaintiffs in error, on certain real estate, also described in the bill; that the notes aforesaid, were by the payees assigned to the defendant in error; the bill further avers, that the last mentioned note has not been paid, and prays that the equity of redemption be barred, &c.

The defendants below failing to appear, a decree *pro confesso*, was entered against them, and the mortgage and notes being produced and proved in Court, a reference was made to the master who reported that, on comparing the bill and notes he finds due and owing to the complainant in this case, one note, executed, May 26th, 1835, due 26th and 29th May, 1838, for sixteen thousand seven hundred and one dollars and forty-five cents, and interest thereon; which decree was confirmed and the usual order of sale, unless the money was paid. From the decree this writ of error is prosecuted by the defendant, Gaines, who now assigns for error.

1st. The decree is erroneous, because the bill does not aver, that the mortgage made to Norris, McGee & McCoy, was ever assigned or delivered to the complainant, or that he ever became the owner of the same.

2d. The Court erred in rendering a decree at the return term of the subpoena.

3d. The decree is erroneous, because the complainants do not show what has become of the other notes not complained of, nor whether paid, or in his possession or outstanding, in the possession of some other person.

4th. The decree is erroneous in confirming the report of them master.

STEWART, for the plaintiff in error.

CAMPBELL, contra.

ORMOND, J.—All the assignments of error, made in this case, are covered by the decisions of this Court, in the cases of Levert et al. v. Redwood, 9 Porter, 80; and the heirs of Duval

v. McClosky, 1 Ala. Rep. N. S. and with the decision of these points in those cases, we are perfectly satisfied.

In reference to the first assignment of error, it may be proper to say that the question, as to whether it was necessary that the assignee of a note secured by a mortgage on real estate, should, in a bill to foreclose the equity of redemption, aver that the mortgage was assigned or delivered to him did, not arise. But we held that the debt was the principal, and the mortgage a mere incident, and that a transfer of the debt was, unless otherwise expressed, a transfer of the mortgage also. This being the law, the allegation of the bill, that the notes were assigned, was equivalent to an averment, that the mortgage was also, assigned. There was, therefore, no error in the decree and it is affirmed.

MERRILL v. JONES.

1. When there is a final settlement of a solvent estate, by the administrator before the county Court, the administrator, on the one side, and all those claiming distribution, on the other, are necessary parties to the settlement.
2. In such a case, the distributees, named in the judgment of the county Court, occupy the position of joint plaintiffs, not because their interests are necessarily joint, but because such judgments arise out of the same proceedings, and the case cannot be removed piece-meal into an appellate Court.
3. When the writ of error in such a case is sued out by one only, when several persons are declared distributees by the judgment of the county Court, the appellate Court has no jurisdiction, and should dismiss the writ of error.
4. If the Circuit Court reverses a judgment of the county Court, on such a writ of error, the reversal is irregular and the judgment of reversal will be reversed, and the case remanded, with instructions to dismiss the writ of error.

Writ of error to the Circuit Court of Covington County.

THIS case had its origin in the county Court, in which Jones appeared, and claimed to be one of the distributees of Benjamin Merrill, deceased, and suggested that Jacob Merrill, the

administrator of the said Benjamin Merrill, had certain slaves belonging to the estate, which had not been accounted for by him, and prayed that the said administrator might be cited to appear, and make a final settlement of the estate.

The administrator appeared to the citation issued on this suggestion; and an issue was made between these parties, and a verdict rendered in favor of Jones. On this verdict the county Court made an interlocutory order. See *Merrill v. Jones*, 8 Porter, 554; directing the administrator to make distribution of the slaves among the distributees,

Afterwards, a final settlement of the estate was made at the instance of the administrator. The decree for final settlement ascertained that, one thousand three hundred and eighty-eight dollars and fifteen cents, was due from the administrator, to the distributees, and directed this sum to be equally distributed between Samuel T. Jones and his wife Rachel; Rachel Merrill, widow of the deceased, and Jacob Merrill, the administrator, in right of his wife, Hillard Merrill. Judgment against the administrator was entered in favor of the two first named distributees, for the several sums of four hundred and sixty-two dollars seventy-one cents each, and the administrator is directed to retain his own share.

A writ of error was issued by the clerk of the Circuit Court, which recites, "that because, in the record and proceedings, and also, in the giving of judgment in the Orphan's Court in the settlement and hearings of the estate Benjamin Merrill, deceased, manifest error has intervened, as it is alledged," Therefore, the clerk of the county Court, was commanded to certify the record into the Circuit Court, that the error, if any, might be corrected. In the Circuit Court errors were assigned, which insist that the county Court erred in making a final settlement, without causing him to bring into the settlement the slaves directed to be distributed by the previous order.

The Circuit Court reversed the judgment of the county Court, and remanded the case for further proceedings.

Throughout the transcript, the case is entitled as Samuel T. Jones v. Jacob Merrill, and this is the only indication of the names of the parties in the Circuit Court.

Merrill, now prosecutes his writ of error to this Court, and assigns that the Circuit Court erred in reversing the judgment of the county Court.

COOK, for the plaintiff in error.

BOLLING, for the defendant.

GOLDTHWAITE, J.—1. In all proceedings for the final settlement of a solvent estate before the county Court, though the administrator may be cited by any one of the distributees, the parties to the final decree must necessarily be the administrator, on the one side, and the distributees on the other.

2. The distributees named in the judgment of the county Court, occupy the position of joint plaintiffs, not because their interests are necessarily joint, but because the judgment arises out of the same proceedings. A similar practice must prevail in cases of the description as that adopted in Chancery cases. In *Cullum v. Batre*, 1 Ala. Rep. 126; we settled the rule applicable to defendants in Chancery when a decree is sought to be revised by them, when the decree is against more defendants than one, though the writ of error may be sued out in the names of all by any one of them, the case cannot be removed piece-meal, but must be reversed or affirmed in such a manner as to preserve the unity of the suit. So, in the present case, although, the judgment of the county Court is several in its terms against the administrator in favor of each of the distributees, it is evident, if the decree for final settlement is reversed, it must necessarily affect all of the distributees; or the unity of the proceedings must be destroyed; hence results the necessity, that all the distributees in whose favor decrees are pronounced, should join in the writ of error.

3. We gather from the recitals of this record, that there were three persons entitled to distribution of this estate,—Samuel T. Jones in right of his wife, Rachel; Rachel Merrill the widow of the deceased; and the administrator himself. The proceedings are all entitled in the name of Jones alone. The writ of error could have been sued out by Jones and his wife jointly, with Rachel Merrill, or by them alone, but using the name of the co-distributee. The writ of error was improperly

issued in this case, and no parties are made in the Circuit Court, either as plaintiffs or defendants. The Circuit Court had no proper jurisdiction of the case, and should have dismissed it, unless a proper writ of error had been substituted.

4. As the Circuit Court had no jurisdiction of the case, in the manner in which it was presented, it is obvious, that this Court cannot affirm a decree, which has nothing to support it. We may remark, that there was no exception taken to the judgment of the county Court; and, if the slaves directed to be distributed by the interlocutory order, were not brought into the settlement, this fact does not appear upon the record, either in the action of the Court, when the final settlement was had; or by the exception of those interested. It is doubtful, therefore, if the decree of the County Court was shewn to be erroneous. However, this may be, it is certain, that the proper course was to dismiss the writ of error. We therefore reverse the judgment of reversal, and remand the case, with instructions to dismiss the writ of error, unless the parties shall agree to substitute such a one as will give jurisdiction to the Circuit Court.

BARNETT v. STANTON & POLLARD.

1. Where it appears that a party "was in the habit of having clothes manufactured at the North for the Mobile market," it cannot be assumed as a conclusion of law, that he was really the manufacturer, but the question should be referred to the jury for their decision.
2. Where goods are open to inspection and are actually examined before the sale, there is no implied warranty of quality, though the manufacturer himself may be the vendor.
3. In order to rescind a contract of sale, at the instance of the purchaser, an offer to return the goods, should be made in a *reasonable time* after the purchase. The non-residence of the vendor furnishes no excuse for delay, if his domicile was known, or might have been ascertained on inquiry; and what is a *reasonable time*, is a question of fact for the jury.

THE plaintiff brought an action of assumpsit against the defendants in the Circuit Court of Mobile, on a promissory note, dated the 31st January, 1838, and payable twelve months after date, for the sum of thirteen hundred and sixty-nine and ten one-hundredths dollars. The cause was tried on the plea of *non-assumpsit*. On the trial, the plaintiff excepted to the ruling of the presiding judge. From the bill of exceptions, it appears, that the note sued on, was given with others for a lot of ready made clothing, purchased on the day of its date, by the defendants of the plaintiff.

It was shown by the evidence, that the defendants were tailors; and that the plaintiff brought the clothing to Mobile, in the spring of 1837, when he sold them to Ryder & Lowe, who being unable to comply with the terms of their purchase, the plaintiff received them back, a short time before the sale to the defendants. It was proved that the clothing was very badly cut and made up, though as usual, each piece was so marked and numbered as to designate its size; but the sizes did not correspond with the marks—the pieces being generally eight or ten inches larger than the marks indicated. And further, before the purchase was concluded, the defendants asked the plaintiff, whether the clothes were of the proper sizes; to which he replied, that “the defendants would see the sizes from the marks or tickets on the clothes.” It was proved that the clothes were so badly cut, as to render them extremely unsaleable—one of the witnesses stated “they would fit no one, and were good for nothing.” The defendants still had on hand a part of the stock, some of it having been sold in Mobile, and in the State of Mississippi. The clothing was intended for summer, and remained in the defendants store, until late in April next after the purchase; previous to its removal, the plaintiff left Mobile for his residence in New Jersey, and did not return until October following. A few days after the plaintiff’s return to Mobile, the defendants informed him, that they had been greatly deceived in the clothing, and offered him ten per cent on the purchase, if he would take them back; but he refused to do so on any terms.

The plaintiff was not a tailor, but was in the habit of having

clothes manufactured at the North, for the Mobile market. The clothing was represented by the plaintiff to be "fresh."

The negotiation for the purchase was pending six or seven days, during which the defendants called several times at the store, where the clothing was deposited, to examine them; and although it was not shown that he did examine them, yet it was proved, that he had ample opportunity for so doing.

The plaintiff's counsel moved the Court to charge the jury, 1st. If the plaintiff made any representation to the defendants, respecting the quality or sizes of the goods, which was false, it constituted no defence; unless it was proved that the plaintiff, at the time of making such representation, knew its falsity. 2nd. That an offer to return goods under the circumstances of this case, must be made in a reasonable time after the purchase, and that such offer after a part of the goods were sold, and so late as the October following the purchase, was insufficient.

Which charges, the Court refused to give; but in answer to the first prayer, instructed the jury, that although it was true as a general rule, that a misrepresentation as to the quality of goods sold, is not a ground of defence to an action for the purchase money, unless the vendor knew of its falsity, yet the manufacturer of goods was presumed and bound to know the quality and description of articles manufactured by him, and whether the marks upon clothing indicated the quality and size of each respective article. In answer to the second prayer, the Court instructed the jury that, as the plaintiff was a non-resident, the defendants were only bound to offer to return the clothing, in a reasonable time after the plaintiff came back to the State; and that the sale of a part, before that time, did not affect the case, because the misrepresentations may not have been sooner discovered.

The jury returned a verdict for the defendants, and judgment being thereon rendered, the plaintiff has prosecuted a writ of error to this Court, and here insists that the Circuit Court erred in the instructions refused, as well as in those given to the jury.

DUNN, for the plaintiff in error.

CAMPBELL, for the defendant.

COLLIER, C. J.—The legal questions arising upon the instructions asked for, as well as those that were given the jury, are decided by the case of *Burnett v. Stanton & Pollard*, (*ante*), with the exceptions of the following. 1. Is the manufacturer of goods presumed and bound to know the description and quality of goods manufactured by him? 2. Was the offer to return the clothing, sufficient to rescind the contract?

1. The bill of exceptions does not explicitly state, that the plaintiff was the manufacturer of the clothing, but that he “was in the habit of having clothes manufactured at the North, for the Mobile market;” yet, in the charge to the jury, it is assumed, that the plaintiff was the manufacturer. Now, it may be true, that the plaintiff was engaged in the business of having goods made for sale, yet it will not follow, that their manufacture was under his supervision or control, or that the clothing, which was the subject-matter of the sale, was made by his order. The Court then, in assuming the fact, it is believed, invaded the prerogative of the jury—if necessary to be determined, it should have been referred to them, as a question of fact to be settled by the evidence.

We are not aware of any adjudged case, in which it has been held, that one under whose supervision, goods are manufactured, is “presumed and bound to know their quality and description,” so as to charge him with a fraud in making a representations, which happens to be untrue. It has been repeatedly said, that if one engage a mechanic to manufacture an article in his line of business, without any stipulation, the law implies the obligation, to make it in a skilful and workmanlike manner; [*Gallagher v. Waring*; 9 Wend. Rep. 28; 18 Wend. Rep. 436. *Waring v. Mason*;] and under such circumstances, implies a warranty of merchantable quality by the vendor. [*Laing v. Fidgeon*, 6 Taunt. Rep. 108; *Jones v. Bright*, 5 Bing. Rep. 533.] Chitty in his treatise on contracts says “In the case of *manufactured* goods, ordered and supplied for a *particular purpose*, there is, it appears, an implied warranty, that they are *reasonably fit and proper for the purpose*; although at the time of the sale, the purchaser had an opportunity of inspecting the goods.”

Without undertaking to inquire, whether the manufacturer of goods impliedly warrants them to be such as are ordered by the purchaser, we are satisfied that, where they are open to inspection, and are actually examined before the sale is consummated, no warranty of quality will be implied. Principle as well as authority is directly opposed to such an idea. [Burnett v. Stanton & Pollard, (*ante.*) and cases there cited.]

2. The Circuit Court should have instructed the jury that, in order to rescind the contract, the offer to return the clothing should have been made in a reasonable time after the purchase. The non-residence of the plaintiff furnished no excuse for the delay, if his domicile was known, or might have been ascertained on inquiry. What was a reasonable time, was a question for the jury, under the circumstances—but in an ordinary case, one half the time, that intervened between the purchase and the offer to return, would be regarded as unreasonable. [Burnett v. Stanton & Pollard, (*ante.*)]

But the offer to return could not rescind the contract; because, as the evidence shows, the defendants had continued, since their purchase, to exercise ownership over the goods, and had sold a part of them. Burnett v. Stanton & Pollard, (*ante.*) The charge to the jury being the opposite of what we have declared the law to be; the judgment is reversed and the cause remanded.

LUCAS, GUARDIAN &c. v. KERNODLE, ET ALS.

1. A father, by deed, conveyed certain slaves to a trustee, for the use of his daughter during her life, to be hired out, and the monthly or annual proceeds to be paid to her, and at her death the slaves to vest in her children. The daughter married, and the husband took possession of the slaves, and hired them out for a year, taking the note for the hire, payable to himself, and transferred it by assignment to one Kernodle; in the month of March of that year, his wife died—Held, 1. That as the slaves vested in the children on the death of the mother, the title will draw after it the right to the hire of the slaves after that period.

2. That under the statute of this State, the assignee of the husband, though a *bona fide* purchaser without notice, was in no better situation than his assignor, and affected by all equities which would bind him, and must therefore be considered a trustee for the amount of the hire of the slaves, which accrued after the death of the owner of the life estate.
2. A Court of Chancery has jurisdiction in such a case.

Error to the Chancery Court at Montgomery.

THIS was a bill in Chancery filed by the plaintiff in error in the Chancery Court at Montgomery, as the guardian, and next friend of Sarah Shelman and five other infants. The bill charges, that John Lucas, the grandfather of the minors by deed, dated in May, 1829, (and which is annexed to the bill) conveyed to Charles J. McDonald certain slaves in trust, for the use and benefit during her life, of Martha A. Shelman, and at her death, remainder over to the minors. That a short time after the execution of the deed, and whilst in the possession of the property, viz: in December, 1836, she intermarried with one John Simmons, who, as her husband, took the slaves into possession, and immediately thereafter, hired two of them to one Clement Freeney, for the term of one year, commencing on the first of January, 1837, for six hundred dollars, and executed his note for that amount, with one Alfred P. King, as his surety, in favor of Simmons.

On the 13th March, Mrs. Simmons, the mother of the minors, died. Notice was in a few days after, given to Freeney by the minors, of their right to the hire of the slaves, from the death of their mother, and that they should hold him responsible therefor; that Simmons transferred the note received on the hiring of the slaves, to one Richard Kernodle, and is believed to have left the State insolvent; that Freeney is dead and his estate is reported insolvent; that Kernodle has commenced an action against King, and that all the parties were informed of the right of the minors to the hire of the negroes after the 13th March. The bill prays an injunction to the suit at law, and that Simmons, the administratrix of Freeney, King and Kernodle be made parties to the bill; that an account be taken, &c. &c. The injunction was granted by a Judge of the Circuit Court.

At the June term, 1840, of the Chancery Court, the Chancellor, on motion, dismissed the bill for want of equity; from which decree this writ of error is prosecuted.

DARGAN, submitted the case for the plaintiff in error, without argument.

FAIR, for defendant in error.

ORMOND, J.—The life estate of the mother of the plaintiffs in error, out of which the present controversy has grown, was created by the deed of her father, by which the slaves were given to a trustee for her use during her natural life, he “permitting her to hold and enjoy the same, at his discretion, to hire out the same, paying the monthly or annual increase to my said daughter.” The deed further provides that, at her death, the slaves and other property shall be vested in her children.

After the making of the deed, the lady married the defendant, Simmons, who thereby obtained as her husband, the possession of the slaves mentioned in the deed, and hired two of them out for a year. His wife having died during the year, the first question necessary to be decided, is, to whom does the proceeds of the hire of the slaves belong.

It is not necessary to enquire into the right, to that portion of it, which accrued from the labor of the slaves, at the time of the death of the wife, as it is conceded in the bill, that it belongs to the assignee of Simmons; as by the terms of the deed, the negroes were authorised to be hired, and by the year, it must have been contemplated by the donor, that it might happen, that the right to the slaves would vest in the plaintiffs in error, at a time when they would not be able, from the contract of hiring, to obtain possession of them. No provision is made in the deed for such a case; but no difficulty could arise, for as the right to the slaves vested at the death of the mother, the right will in equity draw after it, the hire of the slaves for such period.

This would, undoubtedly, be the case, if the trustee; or the mother, had made the contract of hiring. Is the case varied, because the slaves were hired out by Simmons, who took the

note in his own name, and by assignment transferred it to another. It is obvious that Simmons could acquire no right by a breach of the trust, and it is not easy to conceive on what principle, he could convey a larger interest in the note, than he had himself. His interest certainly ceased at the death of his wife; beyond that, as he had no title to the note, he could convey none; but the note being an entire thing, a transfer, though it will convey the legal title in the whole note, will only convey the beneficial interest in that part, which belonged to the assignor, and as to the residue, the assignee, who stands in the shoes of the assignor, will be a trustee for those who are beneficially entitled to it.

It is supposed by the Chancellor, that the equity of Kernodle, supposing that he had no notice of the title of the complainants, is equal to theirs, and that, having the legal title, he must prevail.

In the case of *Smith v. Pettus et al.* 1 Stew. & Por., 107; it was held, that the assignee of a note, for valuable consideration and without notice, was affected by a latent equity subsisting between the parties.

The Statute of this State, making choses in action assignable, merely confers on the assignee the legal title, and enables him to sue in his own name; but subjects him to every defence, which existed between the original parties to it.

By analogy it follows very clearly, that Kernodle, the assignee in this case, is merely clothed with the title of his assignor; if he was a trustee for the whole amount of the note, the assignee must occupy the same position; and his being a *bona fide* purchaser without notice, will not vary the case. It follows as a matter of course, that the rule must be the same where the assignee is beneficially interested in but a part of the note.

It is, also supposed that, conceding that the plaintiffs in error have a right to the hire of the slaves after the decease of their mother, they may recover at law, and therefore, Chancery will not take jurisdiction. Without entering into the enquiry, whether such an action could be maintained, it is sufficient to say that the plaintiffs in error have a clear right to ask the interposition of a Court of Chancery. The whole matter in contro-

versy grows out of a technical trust, and those claiming under it, have a clear right to ask its enforcement in a Court of Chancery.

In the case of *Bibb v. McKinley et al.*, 9 Por. 647; it was held that, if one intrudes upon an infant, he shall receive the profits but as guardian, and the infant shall have an account against him in Chancery as guardian, for equity will consider him as a trustee. If, however, the infant so elect, he may treat him as a trespasser; see also, the cases there cited.

The decree must be reversed and the cause remanded for further proceedings.

BRADFORD v. DAWSON & CAMPBELL.

1. Since the enactment of the act of 1828, Digest 169, 5 & 55, the bond, which the claimant of property levied on by execution, is required to give before a trial of the right of property is had, should be made payable to the plaintiff in execution
2. The bond is intended as a security for the plaintiff in execution; and if a defective bond is executed, the claim ought not be dismissed, if the claimant will execute a proper bond, under the direction of the Court, when the exception is allowed.
3. When a deed of trust to secure certain creditors, is made by a debtor to trustees, and is executed by being signed and sealed as well by the trustees as by the debtor, the certificate by a justice of the peace, that the parties naming, the trustees and debtor came before him, and severally acknowledged that they and each of them signed, sealed, and delivered the deed, for the purposes and consideration, therein mentioned, is sufficient to admit the deed to record under the act of 1828, Digest, 208, S. 5, 7.
4. When the certificate does not pursue the form required by statute, the deed may be looked into to support the defective certificate.
5. The act of 1838, Digest, 208, S. 5, 7, is for the prevention of frauds, and directs, that deeds of trust, which are not recovered within the time limited, shall be void, as to creditors and subsequent purchasers without notice. The registration is permitted to have the effect of notice, but it does not make the deed evidence for any purpose whatever.

Writ of error to the Circuit Court of Coosa County.

CLAIM of property levied on by execution. Bradford caused a writ of *fiery facias* against the goods of one William J. Campbell to be levied by the Sheriff of Coosa county. The goods levied on, were claimed by A. B. Dawson and John Alexander Campbell, under the statute; and a claim bond executed by Campbell, with one Haggerty as surety. This bond is payable to John A. Chapman, Coroner of Coosa county, and recites the levy, and is conditioned to pay the plaintiff in execution all damages, which the jury, on the trial of the right of property, should assess against the claimants, in case it should appear that the claim was made for the purpose of delay.

Previous to making up the issue in the Circuit Court, the plaintiff moved to dismiss the claim, for irregularity and for the insufficiency of the claim bond. This motion was overruled.

The case was tried as if a proper issue had been formed, and the verdict was, that the property claimed was not subject to the execution.

In the progress of the trial, the claimants made title to the goods by a deed of trust, dated 23 March, 1839, purporting to be executed by the defendant in execution, to the claimant therein named. The deed purported to be signed and sealed, by the defendant in execution and the trustees, and to it was attached a certificate in these words: "Personally appeared before me, James A. Pollard, an acting justice of the peace for said county, the above named parties, to wit: William J. Campbell, A. B. Dawson and John A. Campbell, who duly and severally acknowledged, that they, and each of them, signed, sealed and delivered the above instrument, for the consideration and purposes therein mentioned. Given under my hand and seal, this the 23d day of March, 1839.

J. A. POLLARD, J. P. Seal."

The certificate of the clerk of the County Court of Coosa County, was endorsed on this deed, showing that it was received and admitted to record, on the 30th day of March of the same year.

This was the only evidence offered to prove the signing, sealing, execution or delivery of the deed of trust.

The plaintiff objected to the certificate because it was not in conformity with the statute. The deed was admitted in evi-

dence, on this proof of its execution. To which the plaintiff excepted, and a bill of exceptions was signed and sealed.

The plaintiff prosecutes this writ of error, and assigns that the Circuit Court erred in refusing to dismiss the claim for the want of a sufficient bond, and also admitting the deed in evidence, on the certificate of the justice.

PECK, for the plaintiff in error, insisted that the claim ought to have been dismissed, as the condition of the bond is not such as required by the statute; Dig. 169. S. 55. The deed was improperly admitted to record, because the probate of the acknowledgment is not in conformity with the statutes; Aikins' Dig. 88, S. 1; 89, S. 7; Fipps v. McGeehee, 5 Por. 413. It is true, the deed purports to be dated on the same day when it was acknowledged, but it cannot be looked into to aid the defective probate.

But if the deed was properly placed on record, this did not authorise its admission in evidence, without proof of its execution. The deed is required to be recorded to prevent frauds but when recorded the statute does not make it evidence. [Act of 1828, Dig. 208.

GEORGE GOLDTHWAITE, for the defendant in error, conceded that the bond was irregular, having been taken under the act of 1812, which is partially repealed by that of 1828, Dig. 169. But, he argued, there is no reason why these registration acts should be strictly construed. If the certificate conforms substantially to the statute, the deed should be admitted. When this deed is examined, the probate becomes sufficiently certain, although it does not conform to the precise words of the statute.

All deeds of lands may be proved by the certificate of probate, by the act of 1812, and the provisions of that of 1828, are sufficiently broad to authorise the inference, that deeds of trust were intended to be placed on the same footing.

GOLDTHWAITE, J.—1. The concession that the bond is defective, is properly made, as we have already decided, that the act of 1828; Dig. 169, S. 55, repeals so much of the previous statutes, as made two bonds necessary. Hughes v. Rhea,

Conner & Co. 1 Ala. Rep. 609. The bond at present required, is made payable to the plaintiff in execution and the condition, contains the substance of the two, which were previously required to be given.

2. The claim bond is intended as a security for the plaintiff in the execution; and although he may insist on the execution of such a one as the statute directs, yet the claim ought not to be dismissed on account of a defective bond, if the claimant will execute a good one under the direction of the Court, when the exception is allowed. This practice has hitherto been recognized in analogous cases, and its propriety is not doubted, when applied to claims of property levied on by execution. We remark also, that it may be questionable whether a specific description of the goods is not required, as they may be returned in case the claim is not sustained.

3. The deed under which the claimants attempted to support their title to the goods in controversy, is a trust deed, for the purpose of securing debts, and is therefore within the influence of the act of 1828, which provides that all such deeds shall be void against creditors and subsequent purchasers, without notice, unless they are recorded in the office of the clerk of the County Court of the County, wherein the estate may be situate, within thirty days. [Dig. 208, S. 5.] Such deeds are to be proved or acknowledged, as deeds and conveyances of real estate. [S. 7. *ibid.*]

It is evident, when this statute is examined, that the proof and acknowledgment, which is mentioned in the latter section, refers to the manner in which the deed shall obtain a place on the record, and consequently, that the previous acts, authorising the registration of deeds of real estate, must be examined to ascertain what are the necessary requisites.

The act of 1812, provides a form of the certificate of acknowledgment, which is, that the grantor acknowledges, before the proper officer, that he signed, sealed and delivered the deed *on the day and year therein mentioned, to the grantee.*

The certificate in the present case, does not state that the grantor acknowledged that he executed the deed on the day it bears date, to the grantees. It is also acknowledged by those who are not grantors, but to whom the deed ought to have

been delivered, that is, by the trustees. Notwithstanding these apparent defects, we consider the certificate as a substantial compliance with the act of 1812. Digest 89, S. 7; and that it was properly admitted to record. It is therefore necessary to consider whether a deed admitted to record, on an informal certificate, would be void under the statute, when the only object to be attained by the record, is to furnish a means, by which, notice can be had of all valid deeds of trust, by any person seeking the information.

4. The supposed defects in the certificate vanish the instant the body of the deed is examined; for, we then ascertain that the day of the date, is the same day when the acknowledgment was made. We likewise perceive that the deed was executed by the trustees as well as the grantor. It was not necessary, that the former should have signed, or otherwise executed, the deed, and certainly a defective acknowledgment by them cannot prejudice the deed, when no action whatever is required on their part.

It is said, however, that the body of the deed ought not to be looked at to support the probate. It seems to us, that every probate must, of necessity, be compared with the deed; to illustrate our opinion, let the probate be supposed as precisely formal in terms, yet, if the acknowledgment was not made by the person named as the grantor, it would clearly be void. It is obvious, that the difference in the names would appear only from an inspection of the body of the deed, and by comparison with the probate. The same may be supposed of the grantees; or, indeed of the date.

The only general rule with respect to the construction of these certificates, when the object is to support the registration, is, that when the statute has been substantially complied with, the rights of the parties shall not depend on strict criticism, but that any portion of the deed may be examined to give effect and meaning to a certificate, which is apparently defective. [Luffborough v. Parker, 12, S. & R. 48.]

5. The statute of 1828, which makes it essential to the validity of trust deeds of personal estate, as against creditors and subsequent purchasers, without notice, that they should be recorded, is peculiar in its phrasology. The first section, provides,

that the deed shall be void, unless it is recorded within a certain time ; but omits all direction as to the mode by which it shall be authenticated, to authorise the clerk to insert it in the records of the county. This omission is supplied by the third section, providing, that such deeds shall be *proved* or acknowledged in the same manner, as deeds and conveyances of real estate.

It is obvious, that *proved or acknowledged* must refer to the recording of the instrument, and nothing further. The effect of the probate is to admit the deed upon the record, and then it operates as notice to all the world. If it had been intended to give the deed, or an authenticated copy of it, the weight of evidence, without further proof, it is probable that special provision would have been made for this purpose by the introduction of a clause, similar to that contained in the first section of the act of 1807, Digest 88, S. 1 ; which directs, that a deed of real estate, acknowledged and proved in a particular manner, and certified, shall be received in evidence in any Court, as if the same were then, and there, produced and proved.

Some weight is supposed, by the counsel for the defendant, to be given to his view of the statute of 1808, because it makes use of the word *proved* as well as acknowledged. Both these terms are used with reference to the previous statutes of registration, which permitted a deed of real estate to be *proved* before certain officials, by the witness, and then admitted to record on the certificate of this proof, as well as in these cases, when the acknowledgment of the deed was certified. [Dig. 89, S. 7.]

It is unnecessary to consider what effect this statute would have, when real estate was conveyed, and the contest was between the grantee and a creditor of the grantor ; or whether proof of the execution likewise proves the consideration to have been *bona fide* ; but we feel satisfied that the statute of 1828, was only intended to place the deed on record, and nothing farther.

Whenever it becomes necessary to introduce such a deed in evidence, it must be proved as any written instrument ; and before it can avail against creditors or subsequent purchasers,

without notice, it is farther necessary to show that it was recorded within the period limited by the statute.

Let the judgment be reversed and the case remanded, with instructions to dismiss the claim, unless a sufficient bond shall be given by the claimants, and for further proceedings, if one is given.

BROOKS, ET AL. v. HARRISON.

1. A bond executed for the delivery of property, levied on by execution, when returned "forfeited" has the force and effect of a judgment, and execution may issue thereon, against the obligors; but it is competent for one whose name has been forged as a surety to such a bond, to go into equity, and injoin the execution, upon an allegation that the use of his name was unauthorized.
2. The clerk of the Court who has *accepted* a bond for the prosecution of a writ of error, is an essential party to a bill in equity, filed by one whose name appears as a surety, upon an allegation that, as to him, the bond is a forgery.

THE defendant in error, filed his bill in equity against the plaintiff, in the Circuit Court of Montgomery, in the spring of 1835, alleging that Martin Brooks recovered a judgment in the County Court of that County, against Sterling E. Harrison, for the sum of five hundred and eighty dollars, and costs of suit—that an execution, issued on that judgment, was levied on the 26th March, 1834, by William Gregory, then Sheriff of Montgomery, on a negro woman, the property of Sterling E. Harrison; for the delivery of whom, he executed a bond to the sheriff, with the name of the defendant thereto subscribed.

The negro woman not being delivered at the time designated, the delivery bond was returned forfeited, and an execution issued against Sterling E. Harrison, and the defendant. To supersede this execution, a writ of error was sued out, and a bond for its prosecution executed by Sterling E. Harrison with Eli T. Robinson, to which the name of the defendant was subscribed as a surety.

The judgment of the County Court being affirmed on error, an execution was again issued, and levied on the property of Sterling E. Harrison, and a bond taken for its delivery by Bushrod W. Bell, then sheriff of Montgomery—this bond was executed by Sterling E. Harrison and Joseph L. Dackney, and was subscribed with the name of the defendant as a surety.

The defendant denies that he executed, or authorized the execution of, either of these bonds, and insists that, as far as he is a party, they are all forgeries; notwithstanding which, an execution had issued upon some one of them, and was then in the sheriff's hands, requiring the arrest and detention of his body, to satisfy the judgment, with all costs.

The bill makes Martin Brooks, Sterling E. Harrison, Bushrod W. Bell, and David Campbell, the administrators of William Gregory, deceased, defendants, and prays that all proceedings against the complainant may be enjoined, &c.; and that process of *subpœna* may issue to the defendants to the bill. An injunction was accordingly ordered.

The defendants demurred generally to the bill. Several depositions were taken by the complainant, which, unopposed by other proof, very satisfactorily shew that he did not execute either of the bonds referred to in his bill.

The cause coming on to be heard, the demurrer was overruled, and the bill considered as confessed, for want of an answer. And the proof being sufficient to shew, that the bonds so far as the complainant was concerned, were forgeries, the injunction was perpetuated at the costs of the defendants below. To revise this decree, a writ of error has been prosecuted to this Court.

GOLDTHWAITE, for the plaintiff in error.

DARGAN, for the defendant.

COLLIER, C. J.—The plaintiffs in error, insist. 1st. That their demurrer to the bill should have been sustained; 2nd, that the decree is irregular in perpetuating the injunction, without having first required an answer, or on failure to answer, to have taken the bill *pro confesso*.

1. In considering the first question, we are to inquire: first—do the facts stated in the bill, entitle the complainant to

the interposition of a Court of Equity? Second—was the Clerk of the County Court, who accepted the bond, for the prosecution of a writ of error, a necessary party to the bill?

First—Our statutes, in regard to delivery bonds, declare that, upon the bond being returned *forfeited*, to the proper office, it shall have the force and effect of a judgment, and an execution shall issue against “all the obligors therein.” [Aik. Dig. 171.] And where a bond is given for the prosecution of a writ of error, upon an affirmance, a judgment is rendered not only against the plaintiff in error, but all who are obligors in the bond. Such being the character of the several bonds, against which relief is sought, it follows that the defendant in error, has had no opportunity of making a defence at law.

The practice heretofore prevailing in this State, has been adverse to the right, of the judge of a Court from which an execution issues to supersede it in vacation; unless it be for an irregularity, apparent upon the record. In *Fryer v. Austill*, 2 Stewart’s Rep. 119, it appeared that an execution had issued against a principal and his surety, and that a part of the money had been made by a levy on, and sale of the principal’s effects; but the sheriff returned “no money made;” whereupon an *alias* execution, issued against the surety, for the collection of the full amount of the judgment. The sheriff having absconded, it was held, that a Court of law could not afford relief, but the remedy of the surety was in equity alone. This decision was made on the ground that, the proceedings having the appearance of fairness and regularity on their face, it was incompetent for the judge of the Court to supercede it by an order in vacation. In the case at law, there is no pretence, that the delivery bond on which the execution issued, does not in all respects conform to form, and consequently the case cited is directly in point.

The object of the bill then, is not to set aside the execution for errors apparent in the judgment of affirmance, or on an inspection of the delivery bonds, but, for the forgery of the defendant’s name to all the bonds. In this view of the case, it may be assimilated to a judgment obtained by fraud, without any fault on the part of the defendant; which forms a substantive ground for the interposition of equity. [Shottenkirk

v. Wheeler, 3 Johns. Ch. Rep. 275; Foster v. Wood, 6 Johns. Ch. Rep. 90. Peace v. Nailing, Dev. Eq. Rep. 289; Williams v. Fowler, 2 J. J. Marshall's Rep. 405; Saunders v. Jennings, *ibid*, 513.] The defendant in error does not appear to have been guilty of neglect, in not having shewn at an earlier period, that the bonds had not been executed by him. We infer that he was not aware, that his name had been used, and that consequently he could have done no act evincing an authority to any one to bind him. Upon this hypothesis, the jurisdiction of equity is clearly defensible. [Thomas & Harris v. Hearn, et al. 2 Porter's Rep. 262; Mock v. Cundiff, 6 Porter's Rep. 24; French v. Garner, et al., 7 Porter's Rep. 549.

But it is argued for the plaintiffs in error, that the case stated in the bill does not authorize the interference of equity; that no fraud being imputed to Martin Brooks, nor the solvency of Sterling E. Harrison denied, the complainant must pay the execution, and reimburse himself by suit at law, against the party committing the forgeries, or the officers by whose neglect it was permitted. To sustain this argument, the case of Denton, et al. v. Noyes, 6 Johns. Rep. 296, has been cited. That was a motion to set aside a judgment, and all subsequent proceedings in a cause, for irregularity; the motion was supported by an affidavit, stating that a *fieri facias* had been issued on the judgment, which was levied on the property of the defendant; that the defendant was never sued by the plaintiffs for any demand; that he had never authorized them or any one else, to appear for him to a writ, or to confess a judgment for him. The Court held that, as it appeared the judgment was confessed by an attorney of the Court, it was regular; that an appearance by an attorney without a warrant or other authority, was good as to the Court, and that the defendant was entitled to an action against the attorney. If there was any fraud or collusion between the respective attorneys for the plaintiff and defendant; or if the attorney for the defendant was not responsible or perfectly competent to answer to his assumed client, they would relieve the party against the judgment, otherwise a defendant might be undone. The Court said further, that though they would let the judgment stand, in order to protect the plaintiff from a loss by the act of

the attorney, yet to save the defendant from injury, they would stay all proceedings, and let him in to plead, if he had any defence. The opinion of the Court was doubtless influenced by considerations peculiarly applicable to attorneys at law; for they say that, "by licensing attorneys, the Courts recommend them to the public confidence; and if the opposite party, who has concerns with an attorney, in the business of a suit, must always at his peril, look beyond the attorney to his authority, it would be productive of great public inconvenience. It is not usual for an attorney to require a written warrant from his client. He is generally employed by means of some secret confidential communication. The mere fact of his appearance is always deemed enough for the opposite party, and for the Court. If his client's denial of his authority, is to vacate all the proceedings, the consequences would be mischievous. The imposition might be intolerable." The decision, it is true, is supported by some adjudications. [Smith v. Bowditch, 7 Pick. Rep. 137; Field v. Gibbs, et al. 1 Peters's C. C. Rep. 155; Wyckoff v. Beyer, Coxe's N. J. Rep. 214; McCullough v. Guefner, 1 Binney's Rep. 214,] yet it has been directly opposed by others. [Crichfield v. Porter, 3 Ohio Rep. 518; Atkinson v. Commissioners of Pickaway, 1 Ohio Rep. 375; Handley v. Statelor, 6 Litt. Rep. 186; see also Robson v. Eaton, 1 Term Rep. 62; Archb. Plead, 166.] Without attempting to inquire whether in our opinion it should be recognized as an authority, in a case in which the facts are analogous, we cannot think of extending the principle upon which it was decided to the case at bar.

It is an acknowledged principle of law, as well as of natural justice, that no person can be bound by the act of a stranger, in whom he has vested no authority, nor reposed any confidence, and over whom he can exercise no control. True, the *prima facie* intendment always is, that public officers have discharged their duty according to law; yet this presumption will not bar a direct proceeding, which assumes that they have been guilty of a nonfeasance or misfeasance. In the case before us, the complainant confided nothing to the clerk of the County Court, or either of the sheriffs, who received the bonds. It was their duty to have required the signature or ac-

knowledge of all the obligors, before they received the bonds, with the preparation and reception of which, they were respectively charged; and if they have received simulated bonds, they, and not the person whose name has been forged, must answer to the party interested.

Second: but although the bill is not wanting in equity, we think it shews on its face, that the individual who was clerk of the County Court, at the time the writ of error bond was executed, was a material party, and that, consequently, the failure to join him was good cause of demurrer. If the forgery of that bond, so far as the complainant is concerned, is established, then a right of action arises in favor of Brooks against the clerk; and that he might shew, that the name of the complainant was used by his authority, the clerk should have been made a defendant.

The object of a Court of equity, is to do complete justice, and to settle the controversy forever; by binding all the parties interested in it, that this may be done, it is necessary that they should all be brought before it, for its decree only binds those who were parties to the litigation. *Caldwell v. Taggart*, 4 Porter's Rep. 190; *Lube' Eq.* 22, note 1; *Story's Eq. Plead.* 74. et. post; *West v. Randall*, 2 Mason's Rep. 181; *Trescot v. Smith*, 1 McCord's Ch. Rep. 301; *Duncan v. Mizner*, 4 J. J. Marsh's Rep. 447; *Clark v. Long*, 4 Rand Reports, 451; *Crocker v. Higgins*, 7 Conn. Rep. 342; *Allen v. Hall*, 1 Marshall's Rep. 527; *Whelan v. Whelan*, 3 Cow. Rep. 538; *Colt v. Lasnier*, *ibid.* 320; a decree in the present case in favor of the complainant, does not conclude the rights of all parties. The genuineness of the writ of error bond, might be shewn by the clerk in his defence, to an action by Brooks against him; and it would, also be an open question, as between the complainant and the clerk. The demurrer then, was well taken for a non-joinder of parties.

2. It is unnecessary to consider the second point, raised by the plaintiffs in error, in respect to the necessity of a formal order, taking the bill *pro confesso*, &c., after the demurrer was overruled, as that question cannot arise in the further progress of the cause.

The decree of the Court below is reversed, and the cause remanded to the Court of Chancery sitting at Montgomery, that proper parties may there be made, and such further proceeding had, as is consistent with this opinion. The costs of this Court are to be paid by the defendant in error.

FORREST & WIFE v. ROBINSON, EX'R.

1. Where an answer to a bill in Chancery, sets up facts in avoidance of an allegation of the bill, such facts must be proved, unless the complainant consent that the cause be brought to a hearing on bill and answer; and such consent should appear on the record, either expressly, or by necessary implication.
2. A married woman who has a separate estate, which she may charge, is subject to the operation of the rule, as if she were a *feme sole*.

Error to the Chancery Court at Columbiana.

THIS was a bill in Chancery by the defendant in error, to subject the separate estate of Mrs. Forrest, to the payment of a debt alledged to be due from her to the defendant, as the executor of her father. The case was formerly before this Court, reported in 4th Porter, 44, when the principle governing the case, was settled. The question here determined, is one of practice merely, which sufficiently appears in the opinion of the Court.

McCLUNG & PHELAN, for plaintiffs in error.

PECK & CLARK, contra.

ORMOND, J.—When this case was before this Court at a previous term, reported in 4th Porter, 44, certain principles were determined, which are the law of the case. It was then held, that the *ante-nuptial* agreement enabled the wife to act in relation to her separate estate, as if she were a *feme*

sole, and that her written engagement created a lien upon her separate estate.

By the answer, she admits that she executed the bond, set out in the bill, in favor of the complainant, who was the executor of her father's estate, in satisfaction of a claim which the executor set up for disbursements, made on account of the legatees, the amount of the bond being her share. That the executor produced an account of the items, of which, she says, she had no personal knowledge. That since the execution of the bond, she has discovered some errors, and points out the items of the account, in which the error is said to consist. No proof has been taken in the cause, which was tried on the bill, answer, and exhibits.

It is an established rule in equity, that where a defendant sets up matter in avoidance of an admission, it must be proved, if he wishes the benefit of it on the hearing; and we cannot perceive that this differs from any other suit in equity. The defendant, although a married woman, has the same power to charge her separate estate by a written admission that she would have, if she were a *feme sole*; and, having admitted the execution of the bond, which, according to the decree formerly made in this case, is a lien on her separate estate, the effect of this admission cannot be destroyed by the subsequent statements in the answer, that a portion of the bond was without consideration, or was executed in ignorance of the facts. Of these matters, set up in avoidance of a portion of the bond, her answer is not proof, unless the "cause was brought to a hearing by consent, on bill and answer," as provided by the ninth rule of Chancery Practice, 1 Stewart, 617.

By our statute, regulating the mode of proceeding in equity, it is declared, that "it shall not be necessary to file a replication to an answer." (Aik. Digest, 288, s. 17.) The effect of this provision must be, that the statute silently makes up an issue upon the facts alledged in an answer, unless, under the rule of practice before referred to, the complainant waives his privilege of contesting the facts, by consenting that the cause shall be brought to a hearing on bill and answer; and, by so doing, he admits that the answer, whether responsive to the bill or not, is true.

In this case, it does not appear from the record, that the complainant *consented* to bring the cause to a hearing, or, in other words, admitted that the answer was true in all its parts; nor can any such consent be inferred from the state of the record, as exceptions were filed to the answer by the complainant, and the cause was continued. The mere fact that no evidence was taken in the cause, will not authorize the presumption, that the complainant admitted the answer to be true.

The law was thus ruled by this Court, in effect, in the case of *Bates et al. v. Murphy et al.*, cited by the Court in the case of *McGowen et al. v. Young*, 2 Stew. & Por. 189.

But this Court appears afterwards, inadvertently perhaps, to have sanctioned the contrary doctrine, by saying, in general terms, "that when the cause is heard on bill and answer, the allegations of the answer are to be received as true, whether responsive or not." (*Lowry et al. v. Armstrong et als.* 3 Stew. & Por. 301.) The same doctrine is reiterated by the Court, in the case of *Cherry & Bell v. Belcher*, 5 Stew. & Por. 141. In neither of the reported cases does it appear, whether the cause was brought to a hearing on bill and answer *by consent*; nor does the decision in either case, appear to be rested on that fact, but on the ground alone, that the *cause was heard on bill and answer*. It may be that the Court did not intend to place their decision on the broad ground which their language would seem to import, and which involves this singular result, that the complainant must disprove the defendant's defence, although not responsive to his bill, or he will be held to have admitted its truth, though the defendant himself has taken no pains to prove it true. This too is supposed to result from a statute, which puts in issue all the allegations of the answer, without any act on the part of the complainant.

From what has been said, it results that the facts set up in the answer of the defendants, in avoidance of the bond given to the complainant by Mrs. Forrest, not being proved, cannot be considered in this Court; and the bond being thus left uncontradicted, must be declared to be a lien on the separate estate of the respondent, Mrs. Forrest.

The defendant, William Robinson, was a mere nominal party, as shewn by the record. There was therefore no necessity for proof as to him. Let the decree of the Chancellor be affirmed.

JOHNSTON, AND OTHERS, COMPLAINANTS, v. GLASSCOCK AND
WIFE, AND OTHERS, DEFENDANTS.

1. The statute of 1836, provides a common mode by which wills, either of real or personal estate, may be established in the first instance before the County Court.
2. The 55th section of the same statute also provides a new mode by which the heir at law, or nearest of kin of the testator, can contest the will, so that one suit will be conclusive and final; and for this purpose has invested the Court of Chancery with the jurisdiction, authorising it to call in aid the assistance of a jury as in other cases.
3. The same section also provides a period of limitation, much shorter than before was known, after which a will submitted to probate, ceases to be the subject of controversy, and becomes entirely conclusive on all parties interested.
4. The probate obtained in the County Court, is not *prima facie* evidence of the validity of the will in the contest in Chancery. The opportunity given to the heir at law, or nearest of kin, to contest the will in Chancery, is given in the place of the proof, in *solemn form*, of a will of personal property; and of the action of ejectment, when the will is of real estate.
5. The investigation in Chancery must be governed by the same rules and laws which prevailed in similar investigations in the Ecclesiastical Courts, when the will affects personal estate, and the courts of common law, when it passes the real estate, except so far as the statute provides a new rule.
6. In either of these courts, the person claiming under the will, is placed in the condition of an *actor*. Nothing more is necessary, in framing a bill to contest a will under the statute, than to alledge the title, by which the complainant has the right to investigate the probate, and a prayer for relief. If a discovery is wanted, or the circumstances of the case require an injunction, &c., the bill may be framed with a view to such circumstances. The answer should aver every fact and circumstance necessary to make a good will.
7. *Quere*—Whether any probate of a will, under the statute, is necessary to enable a *devisee* to maintain, or defend, an ejectment for the lands devised.
8. The validity of a nuncupative will does not depend on the fact of its being reduced to writing, either before or after the death of the testator, *unless* the probate is deferred for a longer period than six months after the words were spoken. The proof, when the will is contested in chancery, must be of the same quality and degree, (except so far as other evidence is authorised by the 55th section of the statute,) as was proper when the probate was had in the County Court.
9. *Quere*—Whether the *rogatio testum*, in any case, is necessary to be committed to writing, as a part of a nuncupative will, as the statute of 1806 differs from the English statute of Frauds in its terms.
10. The words, *last sickness*, in the statute, are not to be construed to mean *in extremis*. If a person in last sickness—that sickness of which he subsequently dies—impressed with the probability of approaching death, deliberately makes

- his will, conforming to the statute, the will will not be invalid, because he had time and opportunity to reduce it to writing,
11. In such a case, however, the evidence ought to be of such weight as to leave no doubt on the mind of the judge or jury, that the will offered for probate, was, in truth, the will of the deceased; and whenever a will is so made, the Court must be more on its guard than it would be in an ordinary case.
 12. The statute does not provide what number of witnesses shall be necessary to prove a will of personal estate; therefore the law, in force previous to the enactment of the statute, must govern. The common law, properly so called, provided no rules with relation to wills of personal property, but adopted the practice prevailing in the Ecclesiastical Courts. This was governed by the civil and canon laws. The same rules and practice must govern similar cases in this State.
 13. By the civil and canon laws, two witnesses, in general, are necessary to establish a will of personal estate; and the same number is required in this State, whether their testimony is to be given before the Probate Court or the Court of Chancery.
 14. Under the 55th section of the act of 1806, the certificate of the oath of the witnesses, at the time of the taking of the probate, is made evidence to be admitted to the jury, to have such weight as they may think it deserves, on the trial of an issue in fact out of chancery. The same evidence is admissible when the chancellor decides on the proof without directing an issue.
 15. This section of the statute was, doubtless, intended to protect persons claiming under a will, against the *impossibility* of establishing it, if the witnesses were to die after the probate, but before the contest in chancery; and from the *difficulty* of so doing, when, after the probate, they could not be found. The intention of the statute will be best carried into effect, by considering the examination of the witnesses, at the time of the probate, as an examination in chief, leaving it to those who subsequently contest the will, to cross examine the same witnesses, if they deem it important or necessary to do so.
 16. Nuncupative wills are not favorites with Courts of Probate. Much more is requisite to the proof of such a will, than of a written one, in several particulars. In the first place, numerous restrictions are imposed on such wills by the statute, the provisions of which must be strictly complied with. But, added to this, and independent of the statute, the *factum* of a nuncupative will, requires to be proved by evidence more strict and stringent, than a written one, in every single particular; and unless the Court is morally certain, by pronouncing for the will propounded, of carrying into effect the deceased's real testamentary intentions, and no other, it is obviously its duty not to give the will the sanction of its probate.
 17. Where the facts stated in the record of the probate, as having been proved when the will was admitted to probate, are inconsistent with the facts proved on hearing in chancery, a strong presumption of fraud arises, which can only be counteracted by showing that no such evidence was given at the probate, and by accounting most clearly and satisfactorily for the, in that event, false language of the record.
 18. The rule is perfectly well established, that when a will is impeached on the ground of fraud, the parties who seek to establish it, must remove or explain, and so neutralize the facts out of which the suspicion arises. And this rule is held to apply also to fraudulent acts in relation to the obtaining of the probate.

Writ of Error to the Court of Chancery for the Fifth District of the Northern Division.

THIS bill was filed, and subpoena issued, the 5th of April, 1839. The bill alleges that the complainants, John Johnston, Hugh B. Johnston, Thomas G. Coats, in right of his wife Olive, James Loftin, in right of his wife Judy, John Loftin, in right of his wife Matilda, Alley Brady, widow, formerly Alley Johnston, Alexander Johnston, Matilda Johnston, Jenney Ellaby, widow, formerly Jenney Johnston, and Alfred Brady, in right of his wife Olive, are entitled to distribution of the estate of John Johnston, deceased, as his next of kin, and heirs at law. The degrees of consanguinity of each of the complainants, are stated in the bill. It is alleged that Johnston died on the 4th or 5th day of March, 1834, in the county of Tuscaloosa, where he had many years resided, possessed of a large estate, both real and personal; that after his death, a certain nuncupative will, which is made an exhibit, was propounded as the last will of said deceased, and admitted to probate in the County Court of Tuscaloosa county; that when this will was admitted to probate, there was no evidence that the deceased called on any persons to take notice that it was his last will, nor any thing to that effect; that the probate was granted without citations to those principally interested; that the testator died on the day before the pretended will purports to have been made; that the deceased, for two weeks and more, next before his death, was not possessed of a sound mind and disposing memory, in consequence of extreme weakness and disease, and was incapable of making a will; that during all this time, he had no lucid intervals sufficient to enable him to make a valid will; that Sarah C. Johnston (the widow of the deceased, and sole legatee,) has since intermarried with Alexander G. Glasscock; that they are in possession of all the estate, real and personal, except what may be in the possession of John W. Foster, who was appointed administrator with the will annexed.

The bill prays that Glasscock and his wife and Foster may answer the allegations of the bill, and show cause, if any they can, why the said will should not be broke and made void, and

the estate, both real and personal, decreed to descend to the heirs at law and distributees of the deceased.

The answer of Glasscock admits his intermarriage with the widow of the deceased; that the deceased died about the fifth day of March, 1834. It alledges that the deceased, a short time before his death, in the time of his last sickness, at his habitation, and while in sound mind, *being in extremis*, made a nuncupative will, whereby he devised all his real and personal estate to his wife, then Sarah C. Johnston, now Glasscock; that this will was reduced to writing by one of three witnesses who were present at the time of making such will, and called on to bear testimony to the same, on the 6th day of March, 1834, the day following the decease of the testator; that this nuncupative will was admitted to probate by the County Court of Tuscaloosa county on the 7th day of April, 1834, and Foster, the co-defendant, qualified as administrator *cum testamento annexo*; that the estate was finally settled on the 13th October, 1835, after due notice. The answer then proceeds with a statement of the property which came to the possession of Glasscock in his marriage with the widow of the deceased, and of the debts paid him on account of the estate. It then alleges, that the suit is commenced by Courts without the assent or knowledge of the other complainants, all of whom reside out of the State; that Courts was present a short time after the death of Johnston, and privy to the fact that a will had been made, and had been, or was about to be, admitted to probate; and submits, whether the complainants are not estopped from investigating any question whatever arising under the will, inasmuch as more than five years have elapsed since the will was admitted to probate; and concludes by insisting on the limitation of five years as a bar to any relief.

The answer of Mrs. Glasscock, admits the marriage, &c., and alledges that the deceased, about the 1st day of March, 1834, being then in extreme ill health, and in his last sickness, expressed a desire to make disposition of his estate, and to that end, a short time previous to his death, and while *in extremis*, made the disposition contained in the paper following, to wit:

STATE OF ALABAMA, }
TUSCALOOSA COUNTY. } March the 6th, 1834.

I, John Johnston, being mindful of my mortality and impotence of mind, do, in the presence of these witnesses, make the following distribution of my whole property, real and perishable, to my beloved wife ; and if my wife, Sarah Johnston, does marry and have children, the issue of her own body, then and in that case, the whole property to be equally divided amongst them ; and if she dies and leaves no issue, then and in that case, the property to be equally divided amongst her brothers and sisters, and my brothers and sisters, so as to make them equal.

In testimony whereof, we, as witnesses, assign our names the day and date above written. ROBERT WALKER,
JAMES R. LYON,
THOMAS JOHNSTON.

The answer further alledges, that the deceased, at the time of expressing his intention to make the disposition of his estate, named in the instrument set out, called on the said Robert Walker, James R. Lyon, and Thomas Johnston, whose names are signed as witnesses, to bear witness to the same, and that the said will and disposition, as aforesaid, was committed to writing on the 6th day of March, 1834; that the deceased, at the time of making the said will, was of sound and disposing mind, and fully sensible of the disposition he was making of his estate; and was under the control and influence of no disease of mind or persuasion whatever. The answer denies the allegations of the bill, that the deceased was incapable of making a valid will, by reason of bodily weakness, and asserts that when the will was made, the deceased was in perfectly sound mind. The answer of Foster is to the same effect as that of Glasscock, and shows the final settlement of the estate, and vouches the records of the County Court for his discharge from the administration.

The evidence is to the following effect: Doctor Samuel Meek says that Johnston died on the morning of the 6th March, 1834, on North river, in Tuscaloosa county, about six miles above the city of Tuscaloosa. Witness was the attending physician during the last sickness. The deceased was af-

afflicted more or less for near twelve months before his death; but the disease did not assume a serious aspect until ten or fourteen days preceding the death. That the deceased had lost his sight some six or eight months before his last illness. He died of an inflammatory fever. On the 24th or 25th of February, the deceased expected to die. After the disease assumed a fatal character, the witness was with him every two or three days, and sometimes every day, and he does not recollect that he appeared delirious, except one time, which was previous to the 25th of February. The deceased was not emaciated, but at times appeared to be in considerable pain. With the exception alluded to, the deceased appeared to be in the possession of his mental faculties, and possessed of as much strength of mind as one so severely afflicted could be expected to have. The witness saw him on the 4th day of March, not then expecting to see him again, but thinks he saw him also about the time of his death. On the 4th day of March, he was in the rightful exercise of his mental powers, but was very weak in body, and the witness did not expect him to live twenty-five hours, as he then seemed to be sinking. Previous to its last fatal character, the disease was not of such a nature as to induce a belief that it would terminate fatally in any short time. The deceased could write, but the witness does not know whether he was a good writer; from his circumstances, the witness believes he possessed the usual facilities for writing. He saw business men about the deceased during his last illness, and after his disease assumed its fatal aspect, and such as were capable of writing.

Robert Walker states, that he lived a near neighbor to the deceased; was with him a great deal during his last illness; he was confined some fifteen or sixteen days; his bodily health was good for some six or twelve months previously to his last sickness, with the exception of the affliction that he suffered from his eyes. Witness was with him nearly all the time during his last sickness; for two or three days previous to his death, he was phrenzied some two minutes at a time, not exceeding once a day; he did not suffer much from bodily pain; witness does not know what disease the deceased was afflicted with; believes the deceased thought he would die from the first

of his last illness; deceased frequently spoke to witness about the disposition of his property, and said that he desired his property to be and remain in the possession of his wife, during her life time; and, if she married and had children, he wanted the property to be equally divided amongst them; but, if she died without issue, he wanted an equal distribution of his property among his brothers and sisters, and her brothers and sisters; he made a will, which was short, spoken by word of mouth, and afterwards reduced to writing; this will was made a few days after the commencement of his last illness; witness thinks he died about the fifth or sixth of March, but does not remember the year; the will was made some eight or ten days before his death; from the time of making his will to his death, he was once or twice not in his right mind; the balance of the time he was; the derangement continued only for a few minutes at a time; he spoke to the witness to write his will, the first day of his last illness, but witness declined, saying he was a bad scribe; deceased said he was anxious to make a distribution of his property, and desired to have it done as soon as possible; witness said he was unacquainted with the form required in writing a will; through the negligence of the witness, the writing of the will was deferred some two or three days, and then the deceased was advised, by some two or three persons in conversation, in the presence of those who were visiting him in his last illness, that he could make his will by calling in persons to witness it, declaring it *verbally*, and calling on them whom he had called in, to witness it as his will. Thomas Johnston, James R. Lyon, and the witness, were present when the will was made, and were the persons called on to witness it, in pursuance of the advice before alluded to. The deceased said, that he called us (the persons before named,) together, to substantiate his will, and requested all other persons present, to withdraw from the room. The deceased then said to us, the witnesses, that he wished us then, either to take notice, or that he wished to make a distribution of his property in our presence. He said he desired the witnesses to commit to writing, the words which he should speak, as his last will. He said he wanted his property, both real and perishable in the hands of his wife, that she

might have, hold and enjoy his property, real and personal, to her lawful use and behoof, as long as she lived; if she married and had issue, the property to go to her children at her death; if she died without issue, the property to be equally divided between his brothers and sisters, and her brothers and sisters. The will was committed to writing, a few days after he died, by the witness. Witness does not know that any persons competent to write a will, visited the deceased in his last illness. Witness thinks that the deceased was in his right mind, at the time of making his will; his body was not much reduced at the time, nor did he seem to be in much pain; he made the will in the evening; he seemed perfectly easy. The deceased thought he must die, but had no idea of the time or the moment, but did not think he could survive long. Deceased had neither brother or sister, nor the husband of a sister, to visit him in his last illness—they lived at a distance. The estate of the deceased was worth some three or four thousand dollars. Witness did not know whether the deceased had pen, ink and paper about his house, or not; he generally kept them. Witness thinks it was five or six miles from any place where a competent person to write a will, could be procured. Witness is the step-father to Mrs. Johnston; he had examined Hitchcock's Justice, or the Laws of Alabama, with regard to the requisites of nuncupative wills, and thinks he informed the deceased of them, at the time of making the will, or a day or two before.

When cross examined by the defendants, he states that he does not know that the deceased had any property at the time of his marriage, except a horse; he received eight hundred dollars with his wife, besides some bedding and other furniture. Witness thinks the decease was in debt when he married, but does not know to what amount; the debt was paid out of his wife's money. The will of the deceased was to be committed to writing afterwards, and proved as a nuncupative will. The will was committed to writing within fourteen days after the death of the deceased, and subsequently proved in the County Court of Tuscaloosa county. The deceased gave as a reason for bequeathing his property, as he did, to the exclusion of his brothers and sisters, that he had written to them of his situation, when he became blind, and requested them to

come and see him, but that none of them paid any attention to him; he reckoned they would come when he was dead, and try to get some of his property, but he wanted his wife to have it, as the most of it came by her. The blindness of the deceased rendered him incapable to write his will. Witness has no doubt that the deceased, at the time of making the declarations to himself, Lyon and Johnston, which they subsequently reduced to writing, and caused to be proved in the County Court, as above stated, designed and intended the declarations to be his last will and testament, and believed them to be so. Witness believes the writing, presented and proved in the County Court as aforesaid, was substantially what was declared by John Johnson deceased, to be his last will and testament, in the presence of the witnesses aforesaid. Witness thinks that, the year after the death, and before July 1835, Thomas Coats, one of the complainants, was in Tuscaloosa county, and that the witness informed him of the will and its contents, and that it had been proved in Court. The will was made at the residence of the deceased, where he had lived for more than a month.

Castleton Lyon knew the deceased in his life time; his last sickness continued from the 19th February, to the 6th March, 1834; he was in possession of his mental faculties, except on one occasion, after it was said his will was made. Witness was with him every day and nearly every night during his last sickness; witness thinks the deceased made his will about a week before he died; he was not very far gone, when it was said he made his will. The witness sometimes thought the decease might stand it two or three months, and sometimes that he would die shortly. Deceased did not speak to the witness of the disposition of his property during his last sickness, but he heard him speak to others of it. Witness heard him say, Father Walker, (Mrs. Johnson's step father,) will you receive Sarah (his wife.) He answered I will; then the deceased called his wife, and took her by the hand, placing it in her step-father's hand, who said he received her with all his heart. The deceased then said, Father Walker, don't you let my people have one dollar of my property, no, not one picayune, for they never have come to see me in all my sickness, but as soon

as I am dead, Coats will come. This happened a few days before his death, and after the time when it was said he had made his will.

James Cardwell.—Is acquainted with the parties to the suit; was not present when the deceased made his will; he thinks the deceased was taken sick between the 17th and 21st February, and died on the 5th or 6th of March, 1834; he understood the will was made a short time before his death, but has no distinct recollection as to the time; he saw the deceased every day; and he appeared nearly the same from the time he was taken ill, until within a few days of his death; although he was sicker at times than at others, as all sick persons are. He could walk about in the house with assistance, until some three, four, or five days before his death, but the witness does not distinctly remember about it. He does not know that the deceased had implements for writing about his house, but thinks he had. Witness thought the mind of the deceased was good up to the time of his death, except once for a few minutes. The deceased was blind from six to eight months previous to his death, and was incapable of writing. The deceased told him he was broken and in debt when he married, that he had no property but a horse and his clothes; he owed from three to four hundred dollars, which was paid after he married, with money obtained by his wife.

James R. Lyon.—Says he was acquainted with the deceased, for a number of years previous to his death. He knows he made a verbal will, and was present when it was made. He heard no one advise him to make a will. He was alone with the deceased when the will was made, and no other person was present. The deceased said he wanted his property to go to his wife during her life; if she had issue at her death, he wanted it to go to them; if she died without issue, he wanted it to go to his brothers and sisters, and to her brothers and sisters. He was told by the deceased, that he wanted to have some conversation with him, and that he wanted to tell him what disposition he wanted made of his property, if he should die; that he expected to die, and then he made the disposition of his property as before stated. Witness understood the de-

ceased to mean the above disposition of his property as his will, and that he wished him to recollect it as his will. He does not recollect that the deceased called on him, to take notice, that such was his will, but he understood him to intend such to be his will, and to be written down and recorded as such. This was eight or ten days before his death, and he thinks the deceased got worse from that day, and that he was not able to sit up much, if any, afterwards. Saw the deceased every two or three days. He does not know whether the deceased had implements for writing or not, but thinks he had. He was unable to write from blindness. Witness thinks that Esquire Walker had heard, that he knew something about the will of the decease, and called on him. Witness stated what the deceased had said to him, and the will was then reduced to writing by Esquire Walker, and by the witnesses, Esquire Walker, Thomas Johnson, and the witness. Witness thinks this was done a few days after the death of the deceased. He has no doubt that the writing signed by the witnesses as above stated, and proven in the County Court, as the last will and testament of the deceased, was in reality such, and he believes the deceased was in sound mind, and thought he was making his own last will and testament. The deceased died at his own residence, and it was then that he made his will.

Thomas Johnson was examined on behalf of the defendants, and says: That in John Johnson's life-time, witness heard him say, that he wanted his property to go to his widow when he died, for her life-time, and if at her death she never married, and had no children, then he wished it to go to his and her brothers and sisters, to be divided amongst them equally. At the time the deceased made this declaration, he called on Robert Walker, James R. Lyon, and this witness, and it was during his last sickness, not more than five or six days before he died, as the witness thinks.

At the same time the deceased called on these witnesses to take notice, that this was his last will. This declaration was made at his residence. The will, a copy of which is exhibited and produced to the witness is, to the best of his recollection, a true copy of the declaration made by the deceased, about the time of his death, and to which, a witness testified in the Coun-

ty Court of Tuscaloosa County. The testamentary words were reduced to writing a day or two after the death. The deceased was in sound mind at the time the testamentary words were used, and was in great danger of dying very soon, at the time of the declaration. Witness believes that the testator thought that he was making a valid will, and was advised by the old man Walker, that it was valid and would stand. There was no influence exerted by any one, to induce him to make the will he made; it was his own free will. The reasons which he gave for making the will, were, that his wife and himself had made it with what she had at the time he married her. Walker, Lyon, and the witness were called on by the testator, to take notice, that the declaration he then made, was his last will. Cross-examined, he says, "Johnson was taken sick in August, but got well; he was again taken sick sometime in February, and was sick nine or ten days;" but the witness is not certain as to the precise time. He was sicker on some days previous to making the declaration, than he was on the day when he made it. He was not better after making the declaration. He was out of his senses on one occasion, before making the declaration. He was very sick in August, but was not considered dangerous; his disease was of the eyes. The deceased first suggested the before named distribution of his property, as the witness supposes. Witness was in the room, and was requested to leave, for the deceased wished to have some conversation with his wife. Afterwards he was called on, and the declarations made. The deceased called on the witness, on Walker and Lyon, to take notice that this was his last will; he wanted Walker to send for Esquires Terrell and Whitfield to write his will, but Esquire Walker told him that this would do. Witness does not recollect whether this was before or after the distribution was made, but thinks it was before. Witness is a cousin of the deceased, and also a cousin of the defendant, Sarah Glasscock.

An affidavit made by Robert Walker, subsequently to his examination, bearing date in September, 1838, was submitted with the defendant's evidence. He deposes, that in his deposition before given, he made an unintentional error, to wit:

in said deposition, he said, when he answered as to the declaration made by the deceased, that the three subscribing witnesses to the will were present when the declaration was made, but the affiant upon more permanent reflection, says now, that he is certain as to the presence of two—himself and Thos. Johnson, but to as the third one, he is not positive. And he further states, that the then subscribing witnesses to the will in question, were present when the said will was reduced to writing.

An exemplification of the probate of the will in the County Court of Tuscaloosa County, was also produced in evidence by the defendants. So much of this, as is considered in the opinion of the Court, is in these words :

Be it remembered, that at a term of the Orphan's Court, begun and held for the County of Tuscaloosa, on the 31st day of March, 1834, present the Honorable Marmaduke Williams, Judge of said Court, the following order was made. On the application of John W. Foster, to have the probate of the nuncupative will of John Johnston deceased, taken, and letters testamentary on the estate of the deceased. And it appearing to the Court, that the deceased died without issue, and left no legal legatees of his estate, within the limits of this State, except Sarah C. Johnston, relict and widow of said deceased, and Jas. Cardwell. It is therefore ordered by the Court, that a citation issue to the said Sarah C. Johnston and James Cardwell to be and appear before the Judge of the said Court, on Monday the 7th day of April next, to contest said will, if they see cause. And at an Orphan's Court, held for said County, on the 7th day of April, 1834, the nuncupative will of John Johnston, deceased, was presented for probate, and it appearing to the Court by evidence, that said will was reduced to writing before the said testator died, and was read over to him a short time previous to his death, and that he was in his proper senses, and that Robert Walker, James R. Lyon and Thomas Johnston, were called on as witnesses, to testify that was his last will and testament. And it further appearing, by the oath of the said witnesses, that the said will was made in the time of his last sickness, at his residence, in the County of Tuscaloosa, and intended to be his last will. It also appearing, that

fourteen days have elapsed since the death of the testator, and that due notice has been issued according to law, and also, that the said will has been reduced to writing, and here produced in Court to be established—it is therefore, &c. &c.

Here follows an order of probate, and for the appointment of Sarah C. Johnston and John W. Foster as administratrix and administrator, *cum testamento annexo*.

At the hearing, the Chancellor decreed that the bill should be dismissed, as he was of opinion, that nothing was shewn to impeach the validity of the will.

The complainants prosecute this writ of error, and insist that the decree should have been to set aside the probate, and declare the will invalid.

PECK, for the plaintiff in error, insisted,

1. That this will was void, because the *rogatio testium* was never reduced to writing. Lemann v. Bonsal, 2 Ecl. R. 147; Prince v. Hazelton, 20 John. 502; Mason v. Dunham, 1 Mum. 456.

The rules with respect to the ascertainment of the *facta* of nuncupative wills, are very different from those applicable to other wills, and the proof must make out a case of moral certainty in each of the statutory requisitions. Lemann v. Bonsal, *ubi sup*; Bennet v. Jackson, 1 Ecl. R. 229; 2 Black Comm. 501, N. 1. 7.

2. A will of this description, to be valid must be made *in extremis* - 2 Black, Comm. 501, Swift, Ev. 420; Prince v. Hazelton, 29 John. 502; Sykes v. Sykes, 2 Stewart, 364.

3. The discrepancies in the testimony prove either, that the will is a falsification, or that it was obtained by fraud.

PHELAN, with whom was JOSHUA L. MARTIN and PORTER, for the defendants in error, contended.

1. That the bill is so entirely defective, as to present no issuable matter.

2. If the bill can be sustained on its face, the decree is without error, because no single allegation, which has been denied, is sustained by evidence.

3. Every allegation of the answer is sustained by the evidence, even if it is conceded that, to support a will of this description, the testator must be *in extremis*, Bouvier's L. D. 1 vol. 395; Roscoe's Crim. Ev. 24.

4. It is not necessary, however, that the testator should be *in extremis*. Prince v. Hazleton is not supported by any adjudicated case, and all the elementary treatises show, that at common law a verbal will was valid. The statute is a restraining statute, and the words, last sickness, must receive a reasonable construction. This question has never been raised in the Ecclesiastical Courts; Jackson v. Bennet, 1 Ecl. R. 229; 4 H. & M. 91, 98; Brayfield v. Brayfield, 3 Har. & J. 208.

5. The supposed discrepancies in the evidence cannot avail the complainants, because no question as to the execution of the will is raised by the bill. The only matters put in issue are.

1. That the will was admitted to probate without citation.
2. That the *rogatio testium* was wanting.
3. That the testator was of unsound mind.

The first is immaterial, and if true, does not vitiate the will; the last disproved by every witness.

As to the *rogatio testium*, it certainly cannot be necessary to reduce that to writing, in those cases where the will is not required to be so. It is only when a will is offered for probate, more than six months after the testator's death, that it must be shown to have been reduced to writing within six days—Digest tit. wills; Mason v. Denman, 1 Mun. 456.

6. If the complainants intended to put the execution of the will in question, they should have framed the bill accordingly. Story's Eq. 34; Gressly on Ev. 23; Story's Eq. 214; Bank U. S. v. Schulz, 3 Ham. 62; Morrison v. Hart, 2 Bibb, 4; Lemaster v. Burkhart, *ibid.* 26; Jackson v. Cartwright, 5 Mun. 314; Anthony v. Leftwich, 3 Rand. 263; James v. McKenon, 6 John. C. 564; Smith v. Smith, 1 Cowan 734; Morgan v. Crabb, 3 Porter 473; Bozman v. Draughan, 3 Stewart 246; Thomason v. Smithson, 7 Porter 154.

7. All the discrepancies arise, however, from the complainant's own evidence, which he cannot be permitted to contradict.

8. The probate in the County Court, is *prima facie* evidence of the will, and must prevail in the absence of testimony impeaching the execution.

GOLDTHWAITE, J.—1. In the course of the argument, it was insisted, on the part of the defendants, that many of the points relied on by the complainants, are not put issue by the allegations of the bill, and, therefore, ought not to be considered. The weight of the objection to the form of the bill, will be best ascertained by an examination of the statute, which gives to the Court of Chancery the jurisdiction of a contested will, and also by a consideration of the changes which this statute made in the law as previously understood.

The jurisdiction is conferred by the 55th section of the act of 1806. This provides that, “within five years from the time of the first probate of any will, any person interested in such will, may, by bill in Chancery, contest the validity of the same; and the Court of Chancery may thereupon direct an issue or issues in fact to be tried by a jury, as in other cases; and in all such trials, the certificate of the oath of the witnesses, at the time of taking the original probate, shall be admitted as evidence to the jury, to have such weight as they may think it deserves; but, after the expiration of the said five years, the original probate of any will shall be conclusive and binding on all parties concerned; saving however, to infants, *femes covert*, persons *non compos mentis*, or absent from the territory, the like period of five years from and after the removal of their respective disabilities.” [Aik. Dig. 450, S. 15.]

That this enactment extends the previously recognized jurisdiction of Chancery, is evident, because in England at this day the heir at law is not allowed to sustain a bill which seeks, merely to set aside a will of real estate. The reason why Chancery there declines jurisdiction of such a case, is, because the heir has a perfect and complete remedy at law, by the action of ejectment, in the defence of which the devisee derives no aid whatever from the probate of the will before the Ecclesiastical Court. *Jones v. Jones*, 3 Merrivale 161; So, likewise, a bill is never entertained to set aside a will of personal estate, but the parties interested, are left to contest the probate in the Ecclesiastical Courts. *Archer v. Morse*, 2 Vern. 8; *Sheffield v. The Duchess of Buckinghamshire*, 1 Atkyn's 630; *Plume v. Bulle*, 1 P. Wms. 388; The cases in

which the heir at law, and next of kin, are permitted to go into Chancery, are those in which it is necessary to apply for an injunction, or for the appointment of a receiver, to prevent waste or avoid injury, during the pendency of the contest in the proper Courts; but the final decree, even in such cases, is always predicated on the result of the controversy in those Courts. [Andrews v. Powis, 2 Bro. P. C. 476; Jones v. Jones, 3 Merrivale 176.] It is true, that the jurisdiction of Chancery to set aside a will for fraud, was formerly asserted and acted on, by some English Chancellors, but it is believed to have been uniformly disavowed since the case of Kenrick v. Bransley, 3 Bro. P. C. 358, in which a decree of Lord Chancellor Macclesfield, setting aside a will for fraud, was reversed by the house of Lords, for the reasons, that the validity of the will could not be determined, as to personal estate, in the Ecclesiastical Courts, and as to real estate, by the Courts of common law. See, also, the cases collected by Mr. Fonblanque. Trea. on Eq. Book, 1, Sect. 3, note U., and the case of Mariott v. Mariott, 2 Strange 606.

But, notwithstanding, the Court of Chancery declines the power to determine the question of will, or no will, it is the common practice in England, to go into that Court to establish a will of real estate against the heir at law; and after the validity of the will is tested by the trial of an issue *devisavit vel non*, the decree is predicated on the result. This jurisdiction, however, is exercised, as in bills of peace, to suppress interminable litigation, and to give security and repose to titles. [2 Story Eq. 672.

Undoubtedly, the devisee in England, may establish his title by an action of ejectment; but in this, as in an issue of *devisavit vel non*, he is bound to establish the will under which he claims, by witnesses, because the probate gives it no effect as to real estate.

As to personal estate, the will derives its potential force solely from the probate, without which the executor is unable to sustain an action. This probate, by the practice of the Ecclesiastical Courts of England, may be in two forms, of which one is called the *common*, the other, the *solemn* form. The first is, when the will is not contested, then, the executor may

prove it by his own oath ; the latter is, when the will is controverted, and the proof is then, by witnesses examined as in a contested suit. Swinburne, 448, 449 ; 4 Burns' Ecl. Law, 171, 172. The difference in the forms of proving the will is, that if it is proved in common form only, the executor can be compelled, by the next of kin, to prove it in solemn form, at any time within ten years, according to Swinburn, and thirty years, according to Goldolphin, who considers the text of Swinburne, as a misprint. Swin. 449 ; God. O. L. 62 ; 4 Burns' Ecl. L. 171, 172.

From this statement of the law, as it existed unaffected by statutes, it will be seen, that there were many and important distinctions between wills of real and personal estate, both with respect to the *manner* by which they could be established, and the *mode* by which they might be controverted. Our statute of 1806, seems to have been intended to provide a common mode, by which wills, of either description, may be established in the first instance. This view is strengthened by recurring to its 12th and 15th sections ; the former of which, authorises the probate of the will in any country, where the *lands devised* are situate, when the testator had no known place of residence within the State ; and the latter provides for the custody of the will, after its probate, in the Register's office. Both of these clauses are incompatible with the idea that no change was intended as to wills of real estate and the latter seems to be conclusive, that a copy of the will, with the probate, may be used as evidence in other Courts.

2. The 55th section of the statute also provides a new mode, by which the heir at law, or the next of kin, can contest the will in such a manner, that one suit will be conclusive and final ; and for this purpose, has invested the Court of Chancery with the jurisdiction, authorising it to call in aid the assistance of a jury, *as in other cases*.

3. The last change, introduced by the section, is, to provide a period of limitation, much shorter than before was known, after which the will admitted to probate, ceases to be the subject of controversy and becomes entirely conclusive on all parties interested.

4. If the probate first obtained, is to be *prima facie* evidence of the validity of the will when subsequently contested, then it is evident that the heir at law, and next of kin, would be placed in the peculiar position of being called on to establish a negative, which always would be highly impracticable, and, oftentimes, wholly impossible; but such a construction is not called for by any clause in the statute, and is, impliedly, at least, contradicted by the provision, that the certificate of the oath of the witnesses, shall be evidence before the jury on the trial of an issue, *to have such weight as they may think it deserves*. The opportunity afforded by the statute, to the heir at law, and next of kin, or others concerned in the will, to contest it in Chancery, after it has been admitted to probate in the County Court, seems to be given in place of the *proof in solemn form*, as previously practiced in the Ecclesiastical Courts, when the will was of personal property, and of the action of ejectment in a Court of common law, when the will was of real estate.

5. This being, in our opinion, the proper construction, the investigation in Chancery, must be governed by the same rules and laws which prevailed in similar investigations in the other Courts, which have been named, *except so far as the statute provides a new rule*.

6. In either of these Courts, the person claiming under the will, is placed in the situation of an *actor*, and is bound to support the will affirmatively. It is true, that, under the statute, we are considering, the heir at law, or next of kin, is, necessarily, the complainant; but his condition is such, that, after establishing his heirship or kinship, he occupies precisely the same position as the heir at law, when he is the plaintiff in an ejectment, or the next of kin, when he seeks to call in the probate, in common form, of a will. Such being the condition of a complainant under the statute, nothing is necessary in his bill, more than to alledge the title, by which he has the right to investigate the probate, and a prayer for relief. If he requires a discovery, or the circumstances of the case require an injunction, or the appointment of a receiver, the bill may be framed with a view to such circumstances. The bill now before us contains the necessary matter to conform to this view, and

therefore, is considered sufficient to put the defendants on proof of the will.

The answer very properly avers every fact and circumstance, which is considered, even by the complainant's counsel, necessary to constitute a good nuncupation, if we except the *rogatio testium*, which, although averred in the answer, is not stated in the will, as reduced to writing.

7. Whether this is required to be committed to writing, *as a part of the will*, is next to be examined; but, before proceeding to this point in the case, it may be proper here to remark, that we do not decide that probate of a will is necessary to enable a devisee to maintain or defend an ejectment. It is apparent, that no such question is presented by the facts of this case, and there are many views connected with it, which render it important not to be discussed, until involved in some case actually before the Court. We may add, that the question adverted to, has been decided by the Court of Appeals, of Virginia, in *Bagwell v. Elliott*, 2 Rand. 190; and in which case a construction is given to a body of statutes not materially variant from our own.

8. It is very clear, by the terms of the statute, that the validity of a nuncupative will does not depend on the fact of its being reduced to writing, either before or after the death of the testator, *unless* the probate is deferred for a longer period than six months, after the words were spoken. The fifth section of the act of 1806, directs "that, after the expiration of six months from the time of speaking any pretended testamentary words, no testimony shall be received to prove the same to be a nuncupative will, unless such words, or the substance thereof, were reduced to writing, within six days after speaking the same.

If then, the testimony is received within six months, there is nothing which prohibits the establishment of the will, although it may never have been reduced to writing. If the objection of the complainant's counsel to the will, on this ground, is good for any thing, one cannot fail to perceive, that it goes to the whole will, and not merely to the omission to commit the *rogatio testium* to writing, because, the evidence in the Court of Chancery, was taken after the expiration of six months, and the will, certainly, was not reduced to writing, within six days after

the words were spoken; the original probate was had, however, within six months after the speaking of the testamentary words. From the section which we have just now recited, some may suppose, that it was intended never to permit any evidence to be given, respecting any nuncupative will, after the expiration of six months; but such a construction would be manifestly absurd when applied to the provisions of the fifty-fifth section; because, it is evident, that a nuncupative will may be proved *within* six months, although it may not have been reduced to writing, within six days after the words were spoken. Therefore, if the literal terms of the fifth section must be conformed to, and no evidence can be given after six months, in such a case, the next of kin has only to wait the expiration of this period, and then he can successfully contest the will in Chancery, which was previously properly admitted to probate in the County Court. This would be in effect, to change the enactment, and make it, that no nuncupative will shall be valid, unless reduced to writing within six days after the speaking of the testamentary words. When these two sections are considered together, no other construction can be given, than that the proof when the contest is had under the fifty-fifth section, shall be of the same quality and degree, (except so far as other evidence is authorized by the same section) as was proper, when the probate was had in the County Court.

This necessarily disposes of the question raised, with respect to the omission to reduce the *rogatio testium* to writing, as a part of the will, because it was unnecessary, under the statute, to reduce any part of the will to writing, the probate having been made in the County Court within six months after the speaking of the words; therefore it is a matter of no importance to consider, whether the *rogatio testium* is or is not a part of the will, and necessary to be written when the will is so required to be.

9. Should this question ever properly arise, it will be well to consider the marked distinction which exists between the 5th section of the act of 1806, and the 20th section of the English statute of frauds, which provides that no *testimony* shall be taken after six months, to prove any nuncupative will, except the *testimony* or the substance was committed to writing.

We also remark, that we do not understand it to be controverted, that the proof of the *factum* of a *rogatio testium*, is the same as it is to the testamentary words.

10. The next objection is, that the will was not made *in extremis*; and it is insisted that the words, *last sickness*, in the statute, must receive this construction.

The case of Sykes v. Sykes, 2 Stewart, 459, has been cited as a decision of this question by our own Court. We find, however, on looking into it, that this question did not arise from the facts; neither was it raised or necessary to be determined. Therefore the opinion, however much we respect the learned Judge who pronounced it, can only be considered as an *obiter dictum*, and we are consequently constrained to examine the point, as one entirely new in this State. If, before the enactment of the statute for the prevention of frauds and perjuries in England, it was necessary to the validity of a nuncupative will, that it should have been made whilst the testator was *in extremis*, then, it is clear that the same construction ought now to be put on the words, *last sickness*, because, that is certainly a restraining, and not an enabling statute. If such a construction has been given to it even in England, perhaps it should be followed here, because the terms of our own statute are evidently borrowed from it.

But it seems to be considered by Chancellor Kent, in the case of Prince v. Hazelton, 20 John. 511, that unwritten wills were, by the common law, as anciently held, for he says, after quoting Perkins & Swinburn to sustain his own views of the law, "I do not infer from these passages, that unwritten wills were always bad at common law, unless made in a case of extremity, when death was just overtaking the testator. In ignorant ages there was no other way of making a will, but by words and signs; reading was so rare an accomplishment, in the earliest ages of the common law, that it conferred great privileges, and the person who possessed it, was entitled under the name of *benefit of clergy*, to an exemption from civil punishment. But these ancient writers mean to be understood that, in the ages of Henry the 8th, Elizabeth and James, letters had become so generally cultivated, and reading and writing so widely diffused, that nuncupative wills were *properly*, according to Per-

kins, and *commonly*, according to Swinburn, confined to extreme cases; and to be justified only upon the plea of necessity." It seems to us, that this concession puts the question to rest, for if this once was the common law, what right have Courts to change it? If Courts possess this power, why was there any necessity to enact the statute of frauds, when the same end might have been attained, by the Courts declaring that the old law was inexpedient, and not suited for the people in their more enlightened condition? But, in truth, the Courts of England have never advanced this doctrine; nor, so far as we can ascertain, has it ever there been held in any decided case. Indeed, the current of decision in the Ecclesiastical Courts, (the only Courts in which this question could then arise) goes very far to sustain a different view; for it is common, in those Courts, to prove instructions for a will, *as a will*, if they be reduced to writing in the testator's life time, and the formal execution or completion of the will, is prevented by the act of God; and this, even in cases, when the circumstances would not bring the will within the statute of frauds, if considered as a nuncupation. [Sanford v. Vaughan, 1 Phil. 37; Green v. Skepworth, *ibid* 53; Devereaux v. Bullock, *ibid* 60.]

The same rule applies to an unfinished and unexecuted paper, when the finishing and execution are prevented by unexpected death. [Scott v. Rhodes, 1 Phil. 12; Bone v. Spear, *ibid* 345; Wood v. Wood, *ibid* 357; Rockett v. Goade, 3 *ibid* 141; Jameson v. Cook, 1 Hagg. 82; Lumkin v. Bibb, 1 Lee, 1.]

These cases do not rest on the ground, that a good nuncupative will has been made, but the instructions, or the unfinished and unexecuted papers, are established as *written* wills. They are the only cases to be found in the reports of the Ecclesiastical Courts, in which the *extremity* of the testator's life, makes a difference in the decision of the judges.

The total absence of any case at Doctor's Commons, on this precise point, is very persuasive to show, that no such rule as was decided in Prince v. Hazleton, is there recognized as law. There is, however, one case reported in which the question could, and probably would, have been made if the law, be as it was held to be by Chancellor Kent.

In Jackson v. Bennett, 2 Phil. 90, the pretended nuncupation was made on the 29th April, and the death occurred on the 10th May. The allegation of the will was rejected, because of the omission of a sufficient *rogatio testium*. That point in the case, must have been subsequent to that of the last sickness, or *in extremis*. In the report it is stated, that the will was made at the dwelling house of the deceased, and *in his last sickness*. It is also said, that the deceased summoned several of her children to her bed-side when she spoke the nuncupatory words. After making the declaration, she observed that it should be committed to writing; but afterwards said, that the witnesses hearing it, would answer the same purpose. She afterwards asked one of the persons, who were present shortly before the words were spoken, why she left the room, as she wished her to witness what she had to say to her children.

The circumstances, certainly tend to show that the testatrix was not *in extremis*, in the ordinary sense of that term, and as signified by Perkins. She was sick and doubtless expected to die of that sickness, but the inference, that there was ample time and capacity to execute a written will, is well warranted from the facts which are stated. It is true that this was not a contested case, but it is scarcely possible that Sir John Nichol would have rejected the allegation for the want of a sufficient *rogatio testium* if the laws of England only authorized the testatrix to make a nuncupative will when *in extremis*, and that too, when the reverse of a case of extremity appeared from the facts alledged. It must be admitted to be a singular and most extraordinary circumstance, if it was ever law, that a verbal will might be made of personal estate, by one not in the extremity of illness, that this law should have been silently changed, and yet no trace of the change exist in the records of judicial decisions. None of the elementary writers who are quoted by Chancellor Kent, refer to a single decided case, in which the rule has been laid down, even if any of them go to the extent of stating it to be so. Blackstone indeed seems, on the contrary, to admit that such wills may be made; for, after showing how far they have been restricted by the statute of frauds, he says "*the thing itself has fallen into disuse, and*

is hardly ever heard of, but in the only instance in which favour ought to be shown to it—when the testator is surprised by sudden and violent sickness.” [2 Comm. 501.] It may be, that these wills have fallen into disuse, and very properly so; but there is no good reason when they are made, in the manner permitted by the statute, that Courts should refuse to allow their validity.

If a person in his last sickness—that sickness of which he subsequently dies,—impressed with the probability of approaching death, deliberately makes his will, conforming to the statute, we do not feel authorized to say that it will be invalid, because, in point of fact, he had time and opportunity to reduce it to writing.

11. In such a case, however, the evidence ought to be of such weight, as to leave no doubt on the mind of the judge or jury, that the will offered for probate, was in truth, the will of the deceased; and undoubtedly, whenever a will is so made, the Court must be more on its guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaniety and volition, than it would be in an ordinary case. But if there is clear capacity, if there is the *animus testandi*, if it is made at the residence of the deceased, if the witnesses or some of them are called on by the testator, to take notice that it is his last will, the Court must pronounce for it, if it is proved within six months, or afterwards, if reduced to writing within six days after the speaking of the testamentary words.

12. These conclusions bring us, at least, to the examination of the evidence, by which this nuncupation is sought to be proved; but, before entering on its consideration, it is proper to ascertain what number of witnesses are necessary to establish a will of this description. The statute makes three witnesses necessary when lands are devised, but it is entirely silent with respect to the number which is required to validate a nuncupative will, though, it may be inferred, from the terms “*persons present or some of them*,” that more than one are necessary to all its parts, except the *rogatio testium*. As the statute prescribes no rule, we are necessarily thrown back on the previous law for the rules to govern our determination. The common law, properly so called, never contained any

rules with respect to wills of personal estate. It is true, that the course of proceeding in the Ecclesiastical Courts, was engrafted on and recognized as a part of the common law, [1 Black. Comm. 79.] but this course of proceeding was in accordance with the civil and canon laws, unless where those were changed by act of parliament. [ibid 84.] It is evident that, in this country, we must either resort to the same laws to ascertain how such wills may be made and proved, or we are thrown on the wide ocean of discretion, without compass or chart to guide us. A similar view is taken by the Court of Appeals of Virginia, in the case of *Redford v. Peggy*, 6 Rand. 315. That Court considered the practice and laws governing the Ecclesiastical Courts of England, as having been adopted by the colonist of Virginia on its settlement. The same doctrine obtains in Pennsylvania, *Lewis v. Morris*, 1 Dall. 278, and is believed to prevail in all the States, (in the absence of legislative enactments) where the common law furnishes the rules of decision.

13. By the civil and canon law, two witnesses, in general, are necessary to establish a will; and this is the rule which prevails in the Ecclesiastical Courts in England. [*Twaits vs. Smith*, 1 P. Wms. 13; *Redford vs. Peggy*, 6 Rand. 316.] As two witnesses are thus shown to have been necessary previous to the enactment of the statute, it follows that the same number is now requisite, whether their testimony is to be given before the probate court, or the court of chancery.

14. The first evidence, in point of order, is the record of the proceedings had when the will was admitted to probate in the County Court. The 56th section of the statute, as we have seen, provides that the Court of Chancery may direct issues of fact to be tried by a jury, as in other cases; and that, in all such trials, the certificate of the oath of the witnesses at the time of the taking the original probate, shall be admitted as evidence to the jury, to have such weight as they may think it deserves. It is true, that the terms of this clause extend only to the admission of the certificate *as evidence to the jury*, but its spirit extends, equally, to an investigation before the Chancellor; otherwise, it might be that there would be no proof whatever in the one case, and full proof in the other.

15. This section of the statute was, doubtless, intended to protect persons, claiming under a will, against the *impossibility* of establishing it, if the witnesses were to die, after the probate, but before the contest in chancery; and from the *difficulty* of so doing, when, after the probate, they could not be found. The intention of the section will be best carried into effect, by considering the examination of the witnesses at the time of the probate, as an examination in chief, leaving it to those who subsequently contest the will, to cross examine the witnesses, if they deem it important or necessary to do so. This construction prevents the statute from working injustice to either party in the contest. Those propounding a will ought not to be required to prove it again, and after a lapse of time, when the witnesses may be dead, or may have removed away; and, on the other hand, those contesting it, ought not to be placed in a condition where they would be called on to establish a negative; nor ought they to be embarrassed by being compelled to make the witnesses formerly sworn, their own witnesses by a subsequent examination. The witnesses are the witnesses to the will, and ought not therefore to be subject to the cross examination of those who deny its validity. *Bootle vs. Blundell*, 4 Vesey, 509. All of the witnesses who proved the will at the probate, have subsequently been examined by one or the other of the parties, and, therefore, it is unnecessary, at this time, to examine what was then stated by them; for it is certain the examination of both parties, will produce testimony more satisfactory than one which is *ex parte*.

We proceed, then, to the examination of the testimony of the witnesses, with respect to the execution of the will.

[Here the Court recapitulated the testimony given by the witnesses, for which see the statement of the case.]

16. The rules in relation to the evidence requisite to prove a nuncupative will, are thus stated by Sir John Nickell, in the case of *Lemann vs. Bonsall*: 1 Addams, 389. "Nuncupative wills are not favorites with courts of probate; at the same time, if duly proved, they are equally entitled to be pronounced for, with written wills. Much more is requisite, however, to the proof of a nuncupative will than of a written one, in several particulars. In the first place, numerous restrictions are im-

posed on such wills by the statute of Frauds, the provisions of which must be, it is held, strictly complied with, to entitle any nuncupative will to probate. But, added to this, and independent of the statute of Frauds altogether, the *factum* of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one, in every single particular. This is requisite, in consideration of the facilities with which frauds, in setting up nuncupative wills, are obviously attended—facilities which absolutely require to be controverted by courts insisting on the strictest proof as to the *facta* of such wills. Hence the testamentary capacity of the deceased, and the *animus testandi*, at the time of the alleged nuncupation, must appear by the clearest and most indisputable testimony; above all, it must plainly result from the evidence, that the instrument propounded, contains the true substance and import, at least, of the alleged nuncupation; and, consequently, that it embodies the deceased's real testamentary intentions, though not so reduced to writing, during his or her life, as to be capable of being propounded as a written will. For, unless the court is morally certain, by pronouncing for it, of carrying them, and no other, into effect, it is obviously its duty not to give any alleged will, much less a nuncupative one, the sanction of its probate."

Judging the evidence by these rules, it may be questionable whether the testimony given by Walker and Johnston, would authorise a court to establish this will, even if their statements stood uncontradicted and alone.

The intrinsic evidence arising out of the deposition of Walker, is very strong to induce a doubt of the *execution* of the will. He admits that the deceased wished to *write* his will, which the witness declined on account of not writing well; that through his negligence the writing was deferred for two or three days, after which time the deceased was advised by some of his visitors of the manner in which a verbal will could be made. When the will was made, the deceased requested the witnesses to commit it to writing. This witness was solemnly impressed with the idea that it was intended by the deceased as his will, and yet he neglects to comply with this request, until some days after the death, when this bad scribe,

as he terms himself, did that which he refused to do for the deceased at the commencement of his sickness. Again, he says, he examined *Hitchcock's Justice*, or the *Laws of Alabama*, with regard to the requisites of a *nuncupative will*, and thinks he informed the deceased of them at the time the will was made. Now, *Hitchcock's Justice* does not contain a single rule with respect to a nuncupative will, and the *Laws of Alabama* would have informed the witness that real estate could not pass by such a will, even if it is conceded to be probable, that one, who admits his incapacity to write a will, could gather from the statute the meaning of a nuncupative will.

Then, also, the *date* of the will, as it appears in the writing propounded, is very unlikely to be the true date at which it was reduced to writing. The deceased died on the morning of the 6th day of March, on which day the will is dated. It was made, if made at all, several days before that time, and this witness says he committed it to writing *some days* after his death. On the examination, he states that James Lyon was present, and was likewise one of the witnesses called on; afterwards, and when Lyon has contradicted this statement, he says, that on more permanent reflection, he is certain that himself and Johnston were called on and were present. Can we be certain, that on still more reflection, this witness may not arrive at a recollection that such a will was spoken of, but never made with the forms which the law requires?

Some of the facts which this witness states, are not consistent with each other. If books were examined to ascertain how a nuncupative will might be made, it is unreasonable to suppose that, when examined, the witness should not have learned from them, that real estate could not be devised in this way. Again, it is not a little strange that individuals should visit the testator, and be capable of advising with the utmost precision and exactness, to the manner in which he could make a *verbal will*, and yet, not be capable of *writing one*, but the witness says, he does not know that any person competent to write a will visited the deceased in his last illness.

Facts are also stated by this witness, which, if they ever existed, could easily have been proved in corroboration of his testimony, which it must have been evident, it was essential to

support after the examination of James Lyon; and, more especially, after the record of the probate was looked into. Thus, the witness says, that the deceased was advised by *two or three* persons, *in the presence of those who were visiting*, of the manner by which a verbal will could be made. Again, when the will was made, the witnesses were informed of the purpose for which he had requested their attendance, and *all other persons present, were requested to withdraw from the room.*

When we look into the record of the probate, we there find a statement, evidently framed with much caution, and which is most extraordinary, when taken in connexion with the facts elicited on the examination of the witnesses. The statement in the record is, "that it appears to the Court by *evidence*, that the will was reduced to writing, *before* the testator died, and was *read* over to him a short time before his death, and that he was in his proper senses, and that Robert Walker, James Lyon, and Thomas Johnson, were called on as witnesses to testify that was his last will and testament." And it further appearing *by the oath of the said witnesses*, that the said will was made in the time of his last sickness, at his residence, in the county of Tuscaloosa, and intended it to be his last will." How does it happen, that certain facts making this a *written will* of the deceased, and one too, *possibly*, passing his real estate, *appeared by evidence*, whilst certain other facts are stated, as appearing by the oath of the named witnesses, who now testify to no one of the facts, then said to be shewn by *evidence*? There is also, a strong apparent connexion, between the *date* of the will as propounded, and the fact, alledged in the record of probate, that the will was read over to the deceased, a *short time* before his death. He died on the morning of the sixth of March; the will bears that date, and was, as has already been shewn, neither made, nor reduced to writing at that time.

The evidence now before the Court, shews, that when the will was made, it was known, by the principal witness, to be a nuncupative will: yet, on its face, it disposes of the real estate, and the *evidence* before the probate Court, was calculated and possibly intended, to make it so operate.

17. The statute makes the statement in the record evidence; it is the certificate of the oath of the witnesses, and it is to have

such weight as it may be entitled to. It weighs most heavily against those setting up this will, and its effect could only have been counteracted by shewing, that no such evidence was given, and by accounting, most clearly, and satisfactorily for the, in that event, false language of the record.

18. The rule is perfectly well established that, when a will is impeached on the ground of fraud, the parties who seek to establish it, must remove or explain, and so neutralize the facts out of which the suspicion arose. (*Wyatt v. Ingram*, 3 Hagg. 466.) And this rule is held to apply, also, to fraudulent acts in relation to the obtaining of probate. (*Ingram v. Wyatt*, 1 Hagg. 389.) No attempt has been made to do away the strong presumptions, which arise from the statements of the record of the probate, as to what was then proved when taken in connexion with the facts, as shewn by the witnesses ; or to support the testimony given by Walker and Johnson, against the direct and positive declaration of James Lyon.

It is impossible to believe, in the absence of evidence leading to such a conclusion, that the entry in the records of the County Court, was made by mistake, or at random, without design. Nor can the testimony given by the witnesses, be reconciled on any reasonable hypothesis.

Our duty under such a state of proof, and the presumptions which the law attaches to it, is sufficiently performed, by declaring, that the will is not sufficiently proved.

The decree of the Chancellor is accordingly reversed, and this Court, proceeding to render such decree as should have been rendered, doth order and adjudge, that the probate of the will of John Johnson, deceased, heretofore admitted to probate in the County Court of Tuscaloosa County, be set aside and held for naught.

It is further ordered and adjudged, that the estate of the said John Johnson, be distributed as in case of intestacy, and that the defendants, Glasscock and Wife, be declared trustees for those entitled to distribution ; and that the case be remanded to the Chancery Court, in order that an account may be taken, and distribution made.

It is further ordered and adjudged, that the defendant Glasscock, pay all the costs of this Court, and the Court below, to be charged by him against, and paid out of, the funds of the estate.

[After the foregoing opinion was pronounced, further proceedings were had, as follows.]

1. After a decree in Chancery, sustaining the probate of a nuncupative will, has been reversed by this Court, and a decree rendered, setting aside the will as not satisfactorily established, the case will not be remanded, to let in further evidence to explain discrepancies in the evidence.

AFTER the opinion in this case was delivered, the counsel for the defendants in error, petitioned the Court for a re-hearing; and, if the re-hearing was refused, for such a modification of the decree, as to permit new evidence to be taken in the Chancery Court, to explain the supposed discrepancies in the evidence.

The Court refused the re-hearing, but directed the other point to be argued at bar, on the affidavits submitted.

The affidavit of Joshua L. Martin stated, that he attended the examination of the witnesses on behalf of the defendants below. That he was then ignorant of the state of the record of the probate in the County Court, and consequently, the examination was not directed to the explanation of the apparent discrepancy of the statements of the witnesses. That he believes he never saw the record of the probate, until the day when the hearing was had.

The affidavit of Robert Walker states, that he never gave the testimony before the County Court which is stated in the record of the probate, and he is satisfied that none such was given by Lyon or Johnson, the other witnesses; as all were

present, and heard what the others swore. He also states, that he reduced the words to writing, on the evening after Johnson was buried, who died on the sixth, and was buried on the seventh of March, 1834. The day after, a copy was made by Moses P. Walker, which the witnesses signed. He cannot remember why the written memorandum was dated the 6th of March, if it was not a mistake as to the date; for that was not the true time when the words were reduced to writing, which was the 7th, and signed by the witnesses on the 8th.

James R. Lyon swears, that no such testimony was given by him, nor did he hear any such given by the other witnesses. He is confident that no such testimony was given, and is persuaded that the entry is by mistake of the clerk. He has an intimate knowledge of all the parties connected with the transaction, and believes Walker and Johnson to be men of unimpeachable veracity.

Moses P. Walker swears, that he made a copy of the original draft of the will, which was drawn by his father, Robert Walker. To the best of his recollection, the copy was made on the morning of the 8th of March, which was the day after Johnson was buried; and the copy was then signed by the witnesses, who all concurred in the correctness of the will, as drawn by Robert Walker.

M. D. Williams, Judge of the County Court of Tuscaloosa County, states, that he has examined the Clerk's minutes of the probate, and is persuaded the statement therein contained, must have arisen from the mistake, or misapprehension of the Clerk; for he has a clear recollection of the case, and of the testimony of the witnesses, and is quite sure, that neither of them testified that the will had been reduced to writing before Johnson died. From conversations had with Robert Walker, before and at the time of the probate, he understood the will was reduced to writing after Johnson's death; and such, to the best of his recollection, was the testimony of the witnesses, when the will was proven. He does not remember to have seen the entry, after it was made, until lately, when it was called to his recollection; and he is fully impressed with the belief, that the Clerk made an unintentional error in the entry. He is acquainted with Robert Walker, and no man stands higher for truth and veracity.

He says the same of Lyon, and that Johnston has the character of an upright man.

Moses McGuire, the Clerk of the County Court of Tuscaloosa County, states, that his attention has been called to the entry of the probate of John Johnston's will. His first impression was, that the entry was made pursuant to the testimony given by the witnesses; but, being informed that Walker and Lyon, both of whom he knows to be men of veracity, have made affidavit that they did not give testimony to that effect, at the probate of the will, and that the fact was otherwise, as to the reducing of the will to writing, before the death of Johnston—and finding, also, on turning to the minutes of the Court, that on the same day two other nuncupative wills were admitted to probate, besides Johnston's, one of which precedes the entry of Johnston's, which immediately follows; and the entry of the first is in the precise language, (in the particular of having been reduced to writing before the death) of the entry in Johnston's will. His attention has also been called to the fact, that the will commences with, "I, John Johnston," using the first person. From these circumstances and considerations, McGuire says it is possible there may have been an unintentional error committed by him, in making the entry in the minutes of the probate.

PHELAN, for the petition, cited *More et al. v. Caldwell*, 12 Pick. 525; 9 Pick. 426; 2 B. & A. 971; *Hood v. Pimm*, 4 Sim. 101; *Digest*, 237; *Story's Eq.* 336, and notes. *Cox v. Allengham, Jacob*, 337; *Williams v. Goodchild*, 2 Russ. 91; *Gresley's Eq. Ev.* 410; *ibid*, 133.

PECK, contra, cited *Hammersley v. Lambert*, 2 John. Ch. 432; *Gresley's Eq. Ev.* 135; *Durham v. Winans*, 2 Paige, 24; *Dale v. Roosevelt*, 6 John. Ch. 255; *Gray v. Murray*, 4 Johns. 412; *Rawley v. Adams, M. & K.* 543; *Earle v. Pickin, R. & M.* 547.

GOLDTHWAITE, J.—We do not conceive it necessary to examine, whether this Court has the discretion, in any case after a reversal, to remand it, for the purpose of permitting the parties to go into a re-examination of witnesses. If it is admitted we can do so in some cases, we do not consider that the discre-

tion would be properly exercised, under the circumstances attending this case.

The evidence, as we have shewn in the opinion heretofore pronounced, is not satisfactory to establish the will, and the question now is, could it be made satisfactory, consistently with the rules governing Chancery practice. The evidence contained in the record is not merely defective; there is no omission to prove a particular fact, or a writing, on which the case depends, as in the case of Hood v. Pimm, 4 Sim. 101. But the evidence adduced is inconsistent in its several parts; and, it is from an examination of each part, compared with all the other parts, that we have concluded that the will is not sufficiently established. In cases of this description, it is necessary that the Court should be convinced to a *moral* certainty, that the will propounded, is the true will of the deceased, and that every requisite of the statute has been strictly complied with. If the case was sent back and opened for the admission of new testimony, although it might be made stronger, yet the old evidence could not be expunged, and we should be called on to determine which presented the true, and which the mistaken, view of the facts.

It is sufficient to determine us to refuse the petition, that if this motion had been addressed to the Chancellor after the decree, it should not have been allowed; because, to use the words of Chancellor Kent, in the case of Gray v. Murray, 4 Johns. Ch. 412, there never was a re-examination permitted, merely to alter and correct testimony, after the cause had been heard and discussed, and decided on the very matter of fact, to which the testimony referred. It would be setting a most alarming precedent, and would shake the fundamental principles of evidence in this Court.

In the case of Maury v. Mason, 8 Porter, 211, we refused to dismiss a bill, without prejudice to another suit, when the witness, on whose testimony the case depended, was interested, and it was wished to render him competent by a release.

We are satisfied, that it would be a most dangerous innovation in the course of Chancery proceedings, to entertain and allow this petition.

ZURCHER v. MAGEE, SHERIFF, &C.

1. A defendant in a judgment, being summoned as a garnishee, by a creditor of the plaintiff, answered, that he was indebted to the plaintiff in the judgment, &c., at the date of garnishment, but, that since that day, he has paid the amount thereof to the sheriff upon an execution in his hands: thereupon the plaintiff in the judgment, who had given due notice, moved the Court for judgment against the sheriff for the amount so collected: whereupon, after providing that the attorney, who obtained the judgment, should be paid his fees, and the garnishee his expenses for an answer, the Court directed that the balance, after paying costs of the garnishment, should be paid over to the person at whose suit the same issued. Held, that the proceeding was erroneous, and that judgment should have been rendered against the sheriff on the motion.
2. Money collected by a sheriff in virtue of an execution, cannot be attached by garnishment, as the property of the plaintiff in the judgment; for while it remains in the sheriff's hands it is regarded as in the custody of the law.
3. *Semble*—Where the right to receive money collected by a sheriff is contested, the Court from which the execution issued, may, in some cases, decide the question of right, as a guide and protection to the officer in the performance of his duties.
4. Proceedings of a summary character must be sustained by the allegations and recitals in the record, and cannot be aided by intendment.

THE only entry in this cause, with the exception of the order for an appeal to this Court, is in the following words, viz:

“Charles A. Stewart, who has been summoned as a garnishee in the case of T. Sanford vs. James Zurcher, came into court and was sworn. Upon oath says, that at the date of the garnishment, say the 30th April, 1840, he was indebted to Zurcher one hundred dollars, by judgment obtained in the County Court of Mobile county, at the last term of said Court; and further says, that since that date, he has paid the said sum to the sheriff of Mobile upon an execution in his hands.—The said James Zurcher, by his attorney, John F. Adams, moves the Court for judgment against Wm. Magee, sheriff, for 101 33-100 dollars, the said Magee having collected the same by execution from this Court, on the judgment rendered at the last term in favor of Zurcher vs. Stewart, the same not having been paid over on demand made 10th June, 1840, by John F. Adams, plaintiff's attorney. And it appearing to the Court, that

said Magee has had one day's notice of said motion, and that demand has been made as alledged therein. The said motion having been seen and inspected by the Court, it is ordered, that the sheriff pay to the attorney, J. F. Adams, his fees for obtaining the judgment vs. garnishee. The garnishee \$5, for filing his answer in the case of garnishment, and that the balance, after paying costs of the garnishment, be paid over to T. Sanford."

Mr. ADAMS for the plaintiff.

No counsel appeared for the defendant.

COLLIER, C. J.—However equitable may be the order of the County Court, directing distribution of the money, which both Sanford and the plaintiff were seeking to recover, we think it cannot be sustained upon principles of law.

As soon as the amount of the plaintiff's execution against Stewart, was collected by the sheriff, the money was considered as in the custody of the law; and the plaintiff might, after demand of the sheriff, upon one day's notice, have moved the County Court for judgment against him, and recovered the amount received. [Aik. Dig., s. 76, p. 174.]

Whether a claim in suit, or which has been prosecuted to judgment, can be attached by garnishment, so as to defeat the plaintiff in the suit or judgment in a recovery of the money, is a question on which the authorities do not entirely agree. In Grayson vs. Veech, 12 Martin's Rep. 688, it was held, that as the statute of Louisiana authorised the effects and credits of absent debtors to be attached, it was competent for the plaintiff in an attachment to cause the amount of a judgment lately recovered against himself by the defendant, to be attached. And in McCarty vs. Emlen, 2 Yeates' Rep. 190, McKean, Ch. Justice, determined that a debt in suit might be attached in the hands of the defendant in the suit. But in Wallace vs. McConnell, 13 Peters' Rep. 136, it was decided, that a debt, for the recovery of which a suit was pending in the District Court of the United States, could not be attached by process issuing from a county court—that the priority of the suit will determine the right. "And where the suit in one court is com-

menced prior to the institution of proceedings under attachment in another court, such proceedings cannot arrest the suit; and the maxim, *qui prior est tempore, potior est jure* must govern the case. This is the doctrine of this Court in the case of Renner and Bussard vs. Marshall, 1 Wheaton 216, and also in the case of Beaston vs. the Farmers' Bank of Maryland, 12 Peters, 102; and is in conformity with the rule that prevails in other courts in this country, as well as in the English Courts; and is essential to the protection of the rights of the garnishee; and will avoid all collisions in the proceedings of different courts, having then the same subject matter before them—5 Johns' Rep. 100; 9 Johns' Rep. 221, and the cases there cited." If the case quoted *be a correct ascertainment of the law*, it is clear that the judgment of the County Court cannot be sustained. In that case, as in this, the garnishee interposed no objection to the proceeding against him, but his creditor, the defendant, litigated the question.

It has been repeatedly adjudged, that money collected by a sheriff in virtue of an execution, cannot be attached. While it remains in his hands, it is the custody of the law. It does not become the property of the judgment creditor until it is paid over, and consequently is not liable to be attached as his. The writ of garnishment could not supersede the execution, or release the sheriff from a literal compliance with its command, which required him to bring the money into court, so that it might be subject to its order. Ross vs. Clark, 1 Dall. Rep. 354; Alston vs. Clark, 2 Hayw. Rep. 171; Dawson vs. Holcomb, 1 Hammonds' Rep. 275. Cases have frequently occurred, in which the sheriff has been directed to appropriate money in his hands to the satisfaction of a judgment against the party entitled to it, or in which the right to receive the proceeds of a judgment is contested. In such cases, a decision of the court is necessary to guide and protect the officer in the performance of his duties. But the present was not a proceeding of the character of either of these.

As our judgment may rest upon less disputable ground, we decline expressing an opinion whether the debt due from Stewart to the plaintiff, could be reached by garnishment. It does not appear that a judgment was recovered by Sanford either

against Stewart as a garnishee, or the plaintiff as a debtor. For any thing appearing to the contrary, there may have been an attachment pending against the plaintiff at the suit of Sanford, in which it is possible no judgment may ever be obtained. If such be the state of the litigation between them, and there is nothing in the record which shews it to be otherwise, the proceedings in the County Court, if allowed to stand, would be the means of wresting money from the plaintiff to pay a demand not prosecuted to judgment; and should no judgment be recovered, he may be compelled to become the *actor* in Court, in order to his reimbursement.

The entry in the County Court, so far it relates to Sanford's right to the money in controversy, is wholly unsustained. The proceeding is of a summary character, and according to principles recognized here, must be sustained by the allegations and recitals in the record, and cannot be aided by intendment.

The judgment of the County Court must be reversed, and the cause remanded.

LITTELL v. ZUNTZ.

1. When property is sold under a decree foreclosing a mortgage, and the property is purchased by the mortgagee, the biddings will be opened and a re-sale ordered before the confirmation of the sale, if an advance of not less than ten per cent. on the former sale is offered, and the money deposited in Court; but no re-sale will be ordered, when the deposit is less than two hundred dollars.
2. When the property is purchased by a stranger, the sale will not be set aside for mere inadequacy of price, no matter how gross, unless there be some unfair practice at the sale, or unless there is surprise without fault on the part of those interested, and in no case of this description, after confirmation of the sale unless fraud can be imputed to the purchaser, which was unknown at the time of the confirmation.
3. When a sale is thus set aside, the purchaser cannot be charged with rent, unless he has actually received it, and will be entitled to a return of the purchase money with interest, all sums laid out in improvements, his costs and expenses, and a liberal allowance for his trouble.

4. The prevalence of Yellow Fever at the time of the sale, which by causing the removal of a great portion of the population, and the suspension of business, prevented fair competition, held a sufficient excuse for the absence of the party interested from the sale, and the property having sold greatly below its value, a sufficient reason for setting aside the sale, and ordering a resale of the premises.

THIS was a petition filed by Thompson Littell, to set aside a sale made by the Master pursuant to a decree rendered in favor of the petitioner, in a bill filed by him against John N. Warren and others, to foreclose a mortgage; the petition sets forth the facts as follows:

The petition of Thompson Littell respectfully sheweth that, on the day of your petitioner filed his bill in this Honorable Court against John N. Warren and others, for the purpose of foreclosing and selling certain premises in a mortgage deed, described as follows: [Here follows a particular description of the premises.]

Your petitioner further respectfully sheweth, that such proceedings were had in the premises, at the May term of the Court, 1839, that the lands mentioned and described aforesaid, were by the decree of this Court, ordered to be sold by the Master in Chancery, to raise the sum of nine thousand four hundred and ninety-one dollars with interest, being the amount due on said mortgage. Your petitioner further respectfully avers and sheweth, that the said mortgaged premises were amply sufficient to satisfy the said claim, and would at a fair sale have realized money sufficient to satisfy the decree. But your petitioner respectfully sheweth, that the Master in Chancery exposed the said mortgaged premises to sale on the first Monday in September, 1839, at a period when the Yellow fever had nearly or quite reached its crisis, when all the citizens; nearly of Mobile, who had the means, had left it on account of the pestilence; that those who remained, even if they had the means of purchasing property at its fair value, could not be expected, at that awful and devastating period, to have the time or inclination to attend sales, especially when they were held in the centre of the contagion.

Your petitioner respectfully sheweth that, under the foregoing circumstances, in the absence of your petitioner, and his attorney, the premises were offered and sold by the Master in

Chancery, to one James E. Zuntz, for five hundred dollars, who was the highest bidder. That, after deducting all costs and charges, there remained to your petitioner only the pittance of about one hundred and twenty dollars.

In consideration therefore of the premises, your petitioner respectfully prays your Honor, upon his returning to the said Zuntz, his purchase money with interest, which he hereby tenders, to order and decree a re-sale of the premises, and to grant such other and further relief in the premises, as may be agreeable to equity and good conscience.

Accompanying the petition, was an affidavit of its truth.

Zuntz in his answer, admits the facts stated in the petition in relation to the purchase and decree therein stated, and that said property therein referred to, was offered for sale by the Master in Chancery, on the day in said petition stated. That, although the Yellow fever prevailed to some considerable extent in the city, yet, on the day of sale many persons attended, and property to a considerable amount was sold. The defendant further answering says, that the petitioners agent John R. Collins was present at the time of the sale, and had an opportunity, if the property was sold below its value, of running it up, and preventing it from being sacrificed; that said property was publicly offered for sale on said day and purchased by this defendant, for the sum of five hundred dollars—that this defendant was put in possession of said property by the Master in Chancery, soon after the purchase; and soon after commenced improving the said property and repairing the house. That this defendant since the purchase and before he ever heard there was any objection to the confirmation of the sale so made, as aforesaid, laid out and expended in improving and repairing said premises, the sum of five hundred dollars, besides the loss of his time and his attention in superintending the same. That the first he ever heard of any objection to the confirmation of the sale, was in March 1840. That said Collins, agent as aforesaid, was in the city during the fall and winter, and made no objection to the sale. This defendant further answering says, that the sale was fairly and publicly conducted, and the purchase *bona fide* made. That the property was purchased under its value as most of the property sold under

decrees of foreclosure, has been for the last twelve months; but that said property is not worth any thing like the sum stated in said petition. This defendant further saith that, after the purchase, he had a conversation with the attorney of the complainant in relation to said purchase. and was told and assured by him, that the title was good and no objection was made to the sale or purchase. The answer is accompanied by an affidavit of its truth.

Accompanying the petition are the affidavits of several persons, which substantially establish the allegations of the petition.

Affidavits were also produced by Zuntz, to prove the amount of expenditures on the lot made by him, after the purchase.

There is also an agreement, entered into by the defendants to the bill of foreclosure, of their consent to set aside the sale.

Upon the hearing of the motion to set aside the sale on the petition answer and proofs, the Chancellor dismissed the petition without costs, and decreed that the report of the sale stand confirmed, which report is in the following words:

Pursuant to the decree rendered in this cause, I sold on the first Monday of September, 1839, the premises described in the complainant's bill and mortgage, at public auction in front of the Court house of Mobile county; due and legal notice of the time and place of said sale, having been given at which sale so made, James Zuntz became the purchaser at five hundred dollars, that being the highest sum bid, and after satisfying the costs, a balance of three hundred and eighty three dollars and fifty cents remained, which I paid to the complainant and his attorney, John H. Jones, Esq., 3d. September, 1839, signed
M. J. McRAE, Register.

To the said decree the complainant prayed an appeal to this Court, which was granted.

STEWART, for the petitioner cited, 4 Vesy, Jr., 700 ; 5 *ibid.* 86 ; 6 *ibid.* 117 ; 11 *ibid.* 559 ; 4 Bro. C. C. 173.

CAMPBELL, *contra*, cited, 2 Edwards' Rep. 617 ; 13 Wendell's Rep. 224 ; 2 Paige 99 ; McCord, Chan. Rep. 151.

ORMOND, J.—In England it is almost a matter of course to open the biddings, when a larger sum is offered for the pro-

perty before the confirmation of the sale, and in some instances afterwards. By a long series of adjudications, it has been perfected into a system; and as the general rule, the bidding will be opened whenever an advance of ten per cent. on the former sale is offered. This is shown conclusively by the cases referred to by the plaintiff in error, to which many might be added.

This is the first time the question has been raised in this Court; and we are not aware that the practice of opening the biddings upon the principles of the English Chancery, has ever obtained in this State. But the right to set aside a sale made by an order of the Court of Chancery, when a proper case is presented, must of necessity be an attribute of that Court, as the same power is exercised by a Court of Law, when its process has been abused and the power of a Court of Chancery certainly cannot be inferior.

We feel ourselves therefore, authorized to lay down certain rules to regulate this proceeding in future, founded on the principles of natural justice, and having reference to the actual existing state of things in this country.

We do not think it proper to adopt the English rule in all its extent, as it is manifestly unsuitable to the habits of our people, and to the state of thing existing amongst us. In England, land has a fixed and determinate value, and does not fluctuate in the market like personal property; but with us the value of land is exceedingly fluctuating, and its price frequently varies very much in the course of a few months, and is affected generally by the same causes which operate on personal property. Indeed it may be said, that its price is not so fixed and stable, because not in such general demand as one species of our personal property—slaves. To open biddings in all cases therefore, would be exposing the purchaser to a higher bid, if from any cause, land should rise in price, whilst he would be compelled to keep it if it fell. This would be obviously unjust as to the purchaser, and contrary to public policy; as it would injuriously affect all sales of this character, and thus defeat the very object of the rule itself.

We are therefore of opinion, that when a stranger is the purchaser at a mortgage sale, it will not be set aside for mere

inadequacy of price, no matter how gross, unless there be some unfair practice at the sale, or unless those interested are surprised, without fault or negligence on their part; and in no case of this description, after a confirmation of the sale, unless fraud can be imputed to the purchaser, which was unknown to those interested at the time of the confirmation of the sale.

But where the mortgagee is the purchaser, and the debt secured by the mortgage is not discharged by the sale, no reason is perceived why the biddings should not be opened once, upon the offer of a reasonable advance on the former sale, together with the purchaser's costs and expenses, which should be deposited in Court; what would be a reasonable advance, would to some extent depend on the amount in controversy. In the English Chancery, the rule is to require an advance of at least ten per cent. on the first sale, besides costs and expenses; but in no case will the biddings be opened, where the deposit is less than forty pounds, 1 Sim. & Stu. 20, which rule is probably as good, as a general rule, as any that could be adopted.

The reason for the distinction here made between the purchase by a stranger and the mortgagee, is to prevent the oppression, which it is in the power of the mortgagee to practice, in putting down competition at the sale, by preventing any one from obtaining the property, unless he gives its value. The object of the sale is not to transfer the property of the mortgagor to the mortgagee, but to pay the debt; he cannot therefore be injured by any proceeding, which has that for its object, and does not cause any unnecessary delays or expense. [Duncan et als. v. Dodd et als. 2 Paige, 99; Williamson v. Dale et als. 3 Johns. C. 290; Woodhold, Ex'r. v. Osborne, 2 Edwards, 614.]

In this case, property worth eight thousand dollars, was sold by the Master for five hundred dollars. The purchaser was a stranger, attracted to the sale by the advertisement; and according to the principles here laid down, notwithstanding the inadequacy is so gross as almost to demonstrate the unfairness of the sale, it cannot be set aside, unless the complainant, who in this case is the petitioner, can show surprise, unmixed with fault, or neglect on his part.

The sale was made at a time when the yellow fever was raging in the city of Mobile; when according to the affidavits filed by the petitioner, the alarm created by the pestilence, had driven from the city a large portion of its population, and suspended the business and commerce of the city, at least to a very great extent. In our opinion, this affords an ample reason for setting aside the sale. It is impossible to suppose, that under such circumstances, property exposed to sale, could bring any thing like its fair value, not alone by withdrawing competition, but also because the presence of the destroying pestilence, would indispose the minds of most men to make investments of any kind; and it was doubtless owing to these causes, that the property in question did not bring one fifteenth of its value. It also furnishes a sufficient excuse for the absence of the complainant at the time of the sale.

The defendant in his answer states, that one Collins, the agent of the plaintiff, was present at the sale, and interposed no objection. But there is no proof that Collins was the agent of the plaintiff, even if we consider the affidavit of the Master, as regularly sworn to, and a part of the record, which appears to be doubtful. His statement is, that he "*understood* that Collins was the agent of the plaintiff, and saw him on the ground a short time before the sale of the property." This is not sufficiently definite to charge the plaintiff with notice of the sale. If Collins was in fact the agent of the plaintiff, and present at the sale, nothing could have been easier, than to have established it conclusively.

But although for these reasons the sale must be set aside, it can only be done on payment to the defendant of the purchase money, of all sums laid out in improvements on the property, and a liberal allowance for all trouble, costs, and expenses incurred by him.

It is also insisted by the counsel for the plaintiff in error, that the defendant should be charged with the value of the use of the property, during the time he has held it, or at least for the rent which has accrued, if he has rented out the property. The defendant was let into the possession of the property as a purchaser without fault on his part, and his purchase cannot with propriety be changed into a tenancy, so as

to charge him with rent for the use of it. But if he has not occupied it himself, but has rented it out, no reason is perceived why he should not account for the rents actually received by him. The object of the Court is to place him as near as possible, and without injury to him, in the same situation, as if he had never made the purchase; and therefore, although he should not be charged with rent, if he had occupied the premises himself, no reason is perceived why he should be allowed to rent to another, and thus make a profit to himself by an invalid sale.

The decree of the Chancellor therefore confirming the report of the Master, is reversed, and this Court, proceeding to make such decree as should have been made by the Chancellor, hereby order and decree that the report of the Master be vacated, and the sale made by him be annulled, and the deed for the premises, if any was made, be produced and cancelled. That the Master be directed forthwith to state an account between the parties, charging the plaintiff with the purchase money, the amount of all expenditures, and costs laid out in the actual improvement of the property, with interests thereon, and a liberal allowance for the trouble of the defendant; and charging the defendant with the amount of the rent actually received by him, with interest, and if the balance be found against the plaintiff, it shall be paid on confirmation of the report; if in his favor, a decree shall be rendered for the sum thus found due the plaintiff; and any claim for rent not received, shall be transferred to the plaintiff; and thereupon the Master shall proceed to sell the premises as provided in the original decree. Each party will pay his own costs in this Court. Let the cause be remanded for further proceedings.

YOUNG v. CLARK.

1. When there are five sureties to a note, three only of whom are solvent, and the holder sues one who is solvent jointly with one who is insolvent, the solvent surety, by the act of 1839, p. 73, can sustain a motion for judgment against his solvent co-sureties, and may recover against each of them one-third of the sum for which judgment is rendered against him and his co-defendant.
2. The act of 1839 applies as well to contracts then in existence, as to those made in future; but with respect to the former, no execution can be sued out until the surety who obtains the judgment against his co-sureties, has paid the whole or a part of the secured debt. *quere*—Whether the same construction of the statute is not applicable to cases of future contracts.
3. Under this act, the motion may be made either at the term when judgment is rendered in favor of the holder of the security, or at any subsequent term.
4. When the holder of the security sues two sureties jointly, one of them may have the statutory motion against a surety not sued.

Writ of error to the Circuit Court of Tallapoosa County.

MOTION by one surety, for a judgment against another, under the act of 1839.

The facts of this case, as declared by a bill of exceptions, are these :

A joint and several note was made by one Wilson and five others, for 322 dollars, payable the first Monday of April, 1837. The payee sued Benjamin and Bird H. Young, and obtained a judgment in the Circuit Court of Tallapoosa county for 400 dollars, besides costs. All the makers of the note were insolvent, except Benjamin Young, John Clark and Joseph Fitzpatrick. The plaintiff insisted that he was entitled to a judgment against the defendant for *one-third* of the sum for which the payee of the note had recovered judgement against him and Bird H. Young, but the Circuit Court refused to render judgment for more than *one-fifth*. The plaintiff excepted to this decision, and assigns that the Circuit Court erred in not rendering judgment for one-third of the sum recovered by the payee of the note.

HEYDENFELDT for the plaintiff in error, cited and relied on the act of 1839, p. 73.

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—1. The relation of principal and sureties between Wilson and the other makers of the note, is not shown by the facts stated in the bill of exceptions; but as the Circuit Court seems to have predicated its judgment on the assumption, that this relation existed, we shall consider the case in the same aspect.

It is clear, on principle, as well as by the authority of adjudged cases, that a co-surety, in equity, is bound to contribute more than an aliquot portion of the debt, regard being had to the number of sureties, wherever one or more of the sureties happens to be insolvent. The engagement of each surety, is for the whole debt, and as each *may* be made liable for the whole, it is for this reason that a Court of equity insists, when one surety has paid, that he may recover from such of his co-sureties as are solvent, that proportion of the sum paid as will establish a perfect equality between the solvent sureties, and distribute the burthen between them, independent of any contract to that effect. [Dearing v. Winchelsea, 2 B. & B. 270.] The common law Courts in England, however, do not carry this equitable rule into effect; for there, in a suit at law, it has been held that a surety can recover from his co-surety, only that sum which is produced by a division of the debt actually paid by the number of sureties, no regard being had to their solvency. [Cowell v. Edwards, 2 B. & P. 268.]

The Circuit Court, in this case, was probably influenced in its decision, by the rule prevailing in the English Courts of common law; but this proceeding by motion is given by statute; and if its terms cannot govern or be applied to the facts in evidence, the plaintiff, instead of a judgment for a fifth of the sum recovered from him, should have taken nothing by his motion.

The statute directs "when any suit may be pending against any person, who may be a surety to any bill, note, bond, covenant, or other instrument of writing whatever, if there be a co-surety or sureties not sued, it shall be lawful for such person thus sued, to notify in writing his co-surety or sureties, or either or any of them, of the pending of the suit, and it shall be the duty of the Court before which the suit is to be tried, on proof

being made at the trial, that notice in writing has been given to said co-surety or sureties, and that the said parties are sureties, to enter up judgment in favor of the surety sued, against such co-surety or sureties, each thus notified as aforesaid, for the proportion of said debt or demand with costs, which such co-surety or sureties should pay; that is to say, in case there is but one co-surety, then judgment shall be rendered, in favor of the surety sued, for one half of said debt or demand and costs; if there are two co-sureties of the person sued, then for one third; and at that rate according to the number of co-sureties, *provided, however*, that if any of said co-sureties are insolvent, the surety thus sued as aforesaid may, on motion to be made as above, recover a judgment against said co-surety or sureties thus to be notified, the proportion which such co-surety or sureties should pay if such insolvent co-surety or sureties were not bound for said debt or demand." [Act of 1839, pamphlet p. 73.]

It will be perceived that this case is within the precise terms of the proviso, so far as respects the amount of the recovery, unless the fact, that the note was made and became due previous to the time of the enactment, prevents the statute from operating on it. It is then, necessary to enquire whether the statute imposes any additional liabilities on the sureties, as between themselves; for, if such is the case, it is clear it must be held inoperative with respect to these parties, and no judgment whatever, can be rendered for the plaintiff.

If the proper construction of this statute has the effect to make co-sureties responsible to each other, before a payment has been made by some one of them on account of their principal, then it can have no effect on the sureties to contracts made anterior to the time of its passage, because, as will presently be shown, no such liability existed under the contract as made; but, if its only effect is to give a summary remedy by one surety against another in place of, or in addition to, that which might previously have been pursued in a Court of equity, then there is no sufficient objection to the application of this statute, to past as well as to future transactions, provided the execution of the statutory judgment is not permitted, until the right of the surety to call on his co-surety for contribution, has attach-

ed, in consequence of his having made a payment on account of the secured debt to the holder of the security.

We have already shown to what extent co-sureties are liable to each other; but there is no original liability arising out of the contract made with the holder of the security—to him they become liable absolutely on the default of their principal; but to each other, only in the event of a payment of the whole, or of a portion of the debt secured. The statute gives the remedy to any surety, who is sued by the holder of the security, to move for a judgment against his co-sureties, if he gives them notice in writing of the pendency of the suit against him; but it is silent with respect to the time when this judgment may be enforced by execution. If it can be enforced when any payment has been made by the surety, the statute then creates a liability, which is distinct from the contract of the parties, and which is entirely independent of it. The judgment obtained by one surety against another may be satisfied, and yet the surety will not thereby be discharged from his liability to the holder of the security. There is nothing in the statute which requires the surety, who obtains a judgment under it, to pay the holder of the security, before he can be permitted to take out execution; but if this course can be pursued, the surety would then receive money, to which he had no claim whatever in equity and good conscience.

The facts of this case do not call for any construction of the statute, with respect to contracts of suretyship made after its enactment; but we may remark, that it seems obvious, that any construction which might lead to the consequences, which we have adverted to, ought to be avoided, even, as to prospective engagements, unless such an intention is too clear to admit of doubt; but as to such contracts as were made before the passage of the statute, it does not admit of question, that no judgment obtained by one surety against another under it, can be enforced by execution, until the plaintiff has paid the whole, or a portion of the debt secured.

It is questionable whether it was contemplated by this statute to effect any change in the rights or duties of sureties, either as between themselves, or between them and the holder of the security; but it is evident, that a summary remedy was intend-

ed to be given, by which any surety in danger of being compelled to pay the sum secured, might call on his co-sureties, even before the payment, to litigate all the questions which could arise between them, with reference to the common burthen, in order that, so soon as the one who is sued by the holder of the security shall be compelled to pay, that he may at once and without delay, have execution against his co-sureties for the proper sum. Such a construction alone can make this statute applicable to past transactions; and if it shall hereafter be found to apply also, to those contracts which have been made since its enactment, it will be relieved from its apparent harshness, and enable Courts of law to give it the fullest effect as a remedial act applicable to all cases of suretyship.

We consider therefore that, under this statute, a surety who is sued by the holder of the security, is entitled to the benefits of the remedy given by it, on complying with its requisites; but that he can have no execution of the judgment thus obtained, until he has paid the holder of the security, the judgment which he has obtained against the surety.

3. In the view which we have taken, it becomes entirely immaterial whether the surety makes the motion for judgment against his co-sureties, at the same term to which he is sued, or at a subsequent one, if the prerequisites of the statute have been pursued; because he is as much entitled to, and more in need of relief, when he has actually paid the secured debt, than when only in danger of being compelled to do so.

4. So likewise, it is immaterial whether he is sued jointly with another, or is the sole defendant. When he is actually in danger by suit of being compelled to pay, he is entitled, under the statute, to place himself in a condition to enforce contribution as soon as he shall pay; and no inconvenience can result to the co-surety, if an execution cannot be sued out on the judgment obtained by the surety, until payment has been made by him to the holder of the security.

The Circuit Court erred in refusing to render judgment according to the request of the plaintiff in the motion, therefore, the judgment must be reversed and the cause remanded.

HUGHES v. HARRIS.

1. Where an issue, on the plea of *nul tiel record*, is tried by a jury, instead of the court, without objection from the unsuccessful party, he cannot, on error, object to the irregularity.
2. The proceedings and judgment of a court of a sister State were certified by the clerk and attested by the presiding judge; the proceedings were in form such as are had in courts of record, and the declaration was such as is usual, where the cause of action is an exemplification of the judgment of a court of record of a sister State. Held, that it would be intended without further proof, that the court rendering the judgment, is a court of record—the plea not putting that fact in issue, but denying the existence of such a record as the plaintiff alledged.

THIS was an action of debt brought by the defendant in error against the plaintiff, in the Circuit Court of Cherokee, on the exemplification of a judgment rendered by the Inferior Court of the county of Richmond, in the State of Georgia. The cause was tried by a jury on the pleas of *nul tiel record*, payment, &c., and a verdict was found for the plaintiff below.

On the trial, a bill of exceptions was sealed by the presiding Judge, from which it appears that the defendant below objected to the admission of the exemplification of the proceedings and judgment of the Inferior Court of Richmond county, Georgia, in evidence, on the ground that it was not shown that that Court was a court of record. But his objection was overruled and the exemplification read to the jury.

The proceedings and judgment were certified by the clerk of the Inferior Court to be “a true and correct” transcript of the proceedings “in the case of James Harris vs. Isaac Hughes,” “taken from the record and original proceedings,” &c.

Judgment being rendered against the defendant, he has prosecuted a writ of error to this Court, and now assigns for error—First: The Circuit Court submitted for trial the issue on the plea of *nul tiel record* to the jury. Second: That Court admitted improper evidence, as shown by the bill of exceptions.

MOORE and WM. B. MARTIN for the plaintiff in error.

J. D. PHELAN for the defendant.

COLLIER, C. J.—First: In Crawford vs. the ex'rs. of Simonton, 7 Porter's rep. 110, it was decided, that where a party voluntarily permits an issue on the plea of *nul tiel record* to be tried by a jury, instead of the Court, he cannot avail himself of the irregularity on error. In the case before us, no objection was made to the mode of trial, and we must consequently infer, that it was not objected to by the plaintiff in error. The case cited, is then decisive of the first point made.

Second: No objection seems to have been taken to the regularity of the authentication of the proceedings and judgment offered as evidence in the Circuit Court; but the only question there raised was, whether it was necessary to shew by evidence, other than that which the exemplification itself afforded, that the Court in Georgia which rendered the judgment, was a court of record. The transcript being attested by the clerk, and certified by the presiding justice, was *prima facie* evidence sufficient to authorise the inference, that the Court was a court of record; especially when the form of the proceedings was such as would not have been had in a court whose proceedings and judgments were not dignified as records. If it could have aided the defence of the plaintiff, he might have shewn what the law of Georgia was touching the character of the Court.

The declaration is in the usual form on the exemplification of a judgment rendered in a court of record of a sister State; the plea denied the existence of such a record as the declaration described. The issue then to be tried, was whether the cause of action as alledged, really existed. The affirmative of this question was sufficiently sustained by the production of such a judgment as was declared on, certified and attested in compliance with the act of Congress of the 26th of May, 1790. The regularity of the certificate of the clerk and attestation of the presiding justice, were not objected to; but the only question raised being that we have examined, it follows that the judgment of the Circuit Court must be affirmed.

EMBREE & PASCHAL v. NORRIS & KEITH, SURVIVING PARTNERS.

1. The condition of a bail bond for the appearance of the defendants in the original cause, at the return term, for their attendance from term to term, until discharged, is sufficient under the statutes of this State, to charge the obligees as special bail.
2. It is not a sufficient assignment of the breach of a bond for special bail "that the defendants have failed to deliver their bodies to said Circuit Court, or to the sheriff of said county, and their said securities to said bond having also failed to deliver the bodies of said defendants, to said Court, or to the sheriff of said county, or otherwise to discharge said bond, whereby," &c. without also alledging that the defendants have not satisfied the condemnation of the Court.

Error to the Circuit Court of Coosa county.

THE defendants in error brought suit against the plaintiffs in error, by *sci fa.* as the bail of J. F. and M. H. Johns. The condition of the bail bond, as set out in the *scire facias*, is as follows:

"The condition of the above bond and obligation is such, that if the above bound J. F. Johns and M. H. Johns will make their personal appearance before the Honorable the Judge of the Circuit Court, at a Court to be holden at the Court-house in the county of Coosa, at Rockford, on the fourth Monday of this instant, and will attend from day to day and from time to time thereafter, until discharged by due course of law, then and there to answer John B. Norris and Charles Keith, surviving partners of Norris, Crane, and Keith, in a plea of trespass on the case, viz: two thousand and twenty-one dollars thirty-one cents, Mobile, January 23, 1837.—Twelve months after date, Norris, Crane, & Keith or bearer, two thousand and twenty-one dollars thirty-one cents for value received, negotiable and payable at the Branch of the Bank at the State of Alabama, at Mobile."

Signed,

J. F. & M. H. JOHNS.

The above is a copy of the case. Now if the above bound John's will attend the said Court, and abide the decision of the said Court; then, and in that case the bond and obligation to be void, else to remain in full force and virtue.

The breach of the bond set out in the *scire facias* is as follows: "And whereas said defendants, James T. Johns and Micah H. Johns, have failed to deliver their bodies to said Circuit Court or sheriff of said county, and their said securities in said bond, having also failed to deliver the bodies of said defendants to said Court, or to the sheriff of said county, or otherwise discharged said bond; whereby said bond has become forfeited; by means whereof, and by force of the statute in such cases made and provided, said securities in said bond have become liable to pay to said plaintiffs, Norris and Keith in said judgment, the sum of two thousand one hundred and twenty-nine dollars eleven cents, damages recovered by said plaintiffs of said defendants. These are therefore," &c. &c.

To the *scire facias*, there was a demurrer which was overruled; and the following pleas pleaded:

1st. *Nul tiel* record.

2nd. The defendants craved oyer of the bond, and pleaded performance.

3rd. That there was no affidavit as required by the statute, before the issuing of a bail writ. Upon these pleas issue being joined, the jury found for the plaintiffs on which judgment was rendered.

A bill of exceptions was taken to the opinion of the Court, which, from the view taken of the case by the Court, it is unnecessary to set out.

The errors relied on in argument were—the insufficiency of the bail bond, and the want of a sufficient breach in the *scire facias*.

PECK, for plaintiff in error, cited 2 Blackstone Com. 20 Appendix; 2 Dunlap's Practice, 1081; 2 Tidd's Practice, 996; 1 Bac. Ab. title bail, letter D.

PRYOR, contra.

ORMOND, J.—By the common law, the sheriff was bound to produce the body of the defendant in Court, at the return of the writ, and was not bound to take bail for the appearance of the party, unless he sued out a writ of mainprize, though he might do so, if he thought proper. But this giving rise to ex-

tortion and oppression, the statute of 23rd, Henry 6th, was passed by, the 10th section of which, the sheriff was required to let out of prison all persons in custody, of any writ, bill, or warrant, upon reasonable sureties of sufficient persons, upon condition, "that the person shall appear at the day and place contained in the writ, bill, or warrant."

The defendant being thus at large, it was his duty to appear at the return of the writ, and put in bail to the action, or special bail, as it was called, which was a recognizance entered into, before the Court or one of the judges, by which the bail undertook that, if the defendant was convicted, he would satisfy the plaintiff, or surrender himself into custody.

This was substantially adopted by the Legislature of the Mississippi Territory in 1807, by which the sheriff was required "to take a bail bond, with sufficient security, in the penalty of double the amount of the sum, for which bail is required in the endorsement on the writ." The condition of the bond thus to be taken, is not given by the law, but that it was merely intended to secure the appearance of the party, is evident from other parts of the same statute. By the 6th section of the same act, it was provided that, when *special bail* is required, the defendant may go before any of the Territorial Judges, or any justice of the peace, and with his securities enter into a recognizance of special bail, the form of which is provided in the statute.

By the 4th section of the same act, it was enacted that, when the defendant was committed to prison for want of bail, "that the plaintiff may enter an *appearance* for the defendant, and proceed to judgment as in other cases." It is therefore manifest, that the Legislature considered the bail which the sheriff was required to take, was common or appearance bail, in contra-distinction to special bail, and although the condition is not stated in the statute, it cannot be required to be greater than the exigency of the case—the appearance of the party.

The difficulty is created by the 7th section of the same law, which declares that "all bail taken by virtue of this act, shall be deemed, held, and taken as special bail, and as such be liable to the recovery of the plaintiff;" but as the bail here referred to, was evidently mere appearance bail, we do not think it

reasonable, that the legislature intended any alteration of the condition of the bond, they had previously required to be given for the appearance of the party; but merely intended to supersede the necessity of requiring special bail, which imposed the necessity of entering into a recognizance, by declaring that the bail bond, for the appearance of the party should have all the effect in law, of a recognizance of special bail.

It follows from this, that a bail bond executed in the usual form, for the appearance of the party, is by operation of law bail to the action, and subjects the sureties to the responsibilities of special bail. The condition of the bail bond in this case, which is for the appearance of the defendants in the original cause, at the return term, and for their attendance from term to term, until discharged by due course of law, is sufficient.

The breach of the bond, as recited in the *scire facias* is, "that the defendants have failed to deliver their bodies to said Circuit Court, or to the sheriff of said county, and their said securities in said bond having also failed to deliver the bodies of said defendants to said Court, or to the sheriff of said county, or otherwise to discharge said bond whereby," &c.

The undertaking of special bail, which as has been shown, is the legal effect of this bond, is that, if the defendant is cast in the action, he, the defendant, will pay and satisfy the condemnation of the Court, or surrender his body, or that the bail will do it for him; and the breach assigned must be as broad, as the undertaking of the bail. Here it is not alledged that the defendants have not satisfied the condemnation of the Court; it does not therefore appear that there has been any breach of the condition, from which alone the liability of the bail could arise. The general allegation "or otherwise discharge said bond" might be sufficient after verdict but cannot be deemed sufficient on demurrer.

The judgment must therefore for this cause be reversed, and the cause remanded.

THE STATE v. MOREA.

1. When a juror has once been sworn in chief, he cannot be challenged or set aside from the jury, for any cause which existed at the time of his being put on the prisoner.
2. When an opinion is formed by a juror (but never expressed) on mere rumor this is no cause of challenge.
3. An opinion formed from a conversation held with a physician, who is not a witness to any of the facts of the prosecution, but who in the course of the trial is called as a witness, to give his professional opinion, does not disqualify a juror.
4. The Supreme Court is not precluded from examining a question referred to it as novel and difficult, because the action of the Circuit Court on it is purely discretionary.
5. An infant under the age of seven years, may be sworn as a witness in criminal prosecutions, if it has a sufficient knowledge of the nature and consequences of an oath.
6. It is the Court, and not the Judge as an individual, which is to determine the competency of an infant witness; and therefore the examination, as to the competency of the witness, must be made at the trial, and in the presence of the prisoner and his counsel. To admit such a witness upon a private examination by the Judge, is erroneous.
7. In a prosecution for murder, if the death of the deceased was accelerated by the violence of the prisoner, his guilt is not extenuated, because death might, and probably would, have been the result of a disease, with which the deceased was afflicted, at the time of the violence.
8. When the evidence is not stated, in the reservation of a question for the decision of the Supreme Court, and in the absence of any request to modify a charge, the charge will be considered as warranted by the facts, and its correctness in point of law will alone be considered.

Questions referred by the Circuit Court of Cherokee County.

THE prisoner was indicted for murder. The facts of the case, so far as applicable to the questions referred, are these:

When the jury was about to be sworn, one Weakly was called as a juror, and answered on his *voir dire*, that he had formed, but not expressed an opinion, as to the guilt or the innocence of the prisoner. This opinion was not formed from conversation with any of the witnesses in the case, nor did the witness know who the witnesses were. A list of the witnesses endorsed on the indictment, was then read to him, but he answered

that he knew none of them. Not being challenged, this individual was sworn as one of the jury. Afterwards, in the progress of the trial, one Dr. Lee was called as a witness, and examined on behalf of the State. When Lee's name was called, the juror, Weakly, disclosed, that the opinion spoken of by him, was formed from a conversation with Lee, not knowing however, when he was sworn, that Lee was one of the witnesses. The prisoner's counsel then, before the testimony of Lee was given to the jury, objected to the competency of the juror, Weakly, and moved the Court to substitute another in his stead. The counsel for the State resisted this motion, on the ground that Lee was not introduced to prove any substantive fact, but merely to give his opinion as a physician—he having no knowledge of the facts of the case, except from rumor; and also, on the ground that the objection to the juror came too late. The motion was overruled.

The prosecuting counsel then offered a little girl as a witness, who was the child of the prisoner; she was objected to, as being incompetent, on the ground of infancy, and for the want of sufficient discretion. When interrogated, if she knew the nature of the obligation of an oath, she replied, she did not know. When asked her age, she was unable to tell how old she was. The Court, under these circumstances, determined the witness to be incompetent; but afterwards, on a private examination, admitted her to give evidence, she not having been instructed by the Court, as to the future consequences of swearing to a lie; or without giving proper answers to the foregoing interrogatories propounded to her.

After the evidence was closed, the prisoner's counsel asked the Court to charge the jury, if they believed the deceased died of the fever, and not by the violence inflicted by the prisoner, although the violence may have accelerated his death, that then the prisoner should be acquitted.

This the Court refused, and instructed the jury, if they believed that the violence inflicted by the prisoner accelerated the death, although the deceased may have died of the fever, yet, the prisoner was guilty of murder.

The prisoner was convicted and sentenced, but all the questions arising out of the facts as stated, were reserved, as novel and difficult, for the decision of the Supreme Court.

MOORE, with whom was HOPKINS, for the prisoner.
The ATTORNEY GENERAL, for the State.

GOLDTHWAITE, J.—1. It would have been irregular to stop the trial, for the purpose of substituting a juror in the place of Weakly, even if the opinion formed by him, had ever been expressed. The prisoner was not deceived; for he knew from the previous examination of the juror, that some opinion had been formed by him, and might have challenged peremptorily. Instead of doing this, he accepts the juror, who is sworn in chief. All the authorities concur in the opinion, that when a juror is once sworn, he cannot be afterwards challenged for a cause which existed at the time when he was put on the prisoner. (Chitty's Criminal Law, 444, and cases there cited; Yelverton 24; Williams v. The State, 3 Stew. 454.)

2. 3. If this matter had been disclosed at the time of swearing the juror, it would not have availed the prisoner as a cause of challenge. The opinion, whether in favor of, or against the prisoner, was never expressed, and for this reason alone, it may be questionable, whether either the State or the prisoner, could challenge for cause. But which ever way the bias of the juror may have been, it was clearly formed from mere rumor, because Lee, from whom his information was derived, had no knowledge of the facts attending the homicide, and when called as a witness, was to give testimony of his opinion as a physician, upon the facts detailed by others.

4. Some doubt seems to have been heretofore felt, whether this Court is not precluded from the revision of a question, when of such a description, that the action of the Circuit Court upon it, must be purely a matter of discretion.

The only limitation provided by the statute is, that the question referred, shall be novel and difficult. (Aikin's Digest, 257, s. 16.) Previous to this enactment, the Circuit Courts, at their discretion, could respite the judgment in any criminal case, on *a point reserved, motion in arrest of judgment, or for a new trial*, for the consideration of the Supreme Court. (Digest, 243, s. 22.)

The Circuit Court unquestionably has the right to require the opinion of this Court on any question, whether the judgment to

be exercised by it is discretionary or otherwise, which arises in a criminal case, and which is considered by the presiding Judge *as novel and difficult*.

It is therefore, not very important to ascertain, whether the admission or rejection of an infant witness, is a matter of discretion; as distinguishable from a matter of right, and thus resting solely with the Judge trying the cause; but if it is conceded to be so, the proper exercise of that discretion, is one of the matters referred in this case. It may not be improper to add, that we incline strongly to the impression, that the admission or rejection of all evidence, is not a matter of mere discretion, but rather, that all such questions involve rights which must be ascertained, and determined, by fixed principles, and by the rules of law. We are not aware of any adjudicated case, which tends to support Mr. Starkie in the contrary opinion, which is stated in his work on evidence, 2 vol. 393.

5. We are not certain that the reference made in this case, is as precise as it might have been; but we understand the main question to be, whether the Circuit Court was authorized to arrive at a conclusion, respecting the admission or rejection of the infant witness, from a *private examination, after a public examination in Court* had resulted in the exclusion of the witness, in consequence of an apparent defect of knowledge, with respect to the obligations of an oath.

In Lord Hale's time, it was common to examine children of tender years, without swearing them. (1 Hale, P. C. 634.) This practice was overturned in 1779, in Brazier's case, when the Judges were unanimously of the opinion, that no testimony whatever, could be legally received, except when given on oath; and that an infant, though under the age of seven years, might be sworn in a criminal prosecution, provided such infant appeared, on a strict examination, by the Court, to possess a sufficient knowledge of the nature and consequences of an oath; for there is no precise rule as to the age within which infants are excluded from giving evidence, but their admissibility depends on the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if

they are found incompetent they, cannot be received. (Rex v. Brazier, Leach 346; Buller's N. P. 393.)

6. This case is a most satisfactory exposition of the law, and establishes that the Court, and not the judge, as an individual, is to be satisfied of the competency of the infant offered as a witness. It may be objected, it is scarcely possible, that an infant of such tender years, can be capable of satisfactorily answering questions amidst the bustle and confusion of a Court-house; but certainly the consequences would be alarming, if the admission of such a witness might be effected through the medium of a private examination; and more so, when one made in public had proved to be unsatisfactory.

We do not wish to be understood as intimating, that the precise interrogatories used in this case were necessary, or even, that only such would be proper. The competency of such witnesses depends on the sense and reason they entertain of the danger and impiety of falsehood, and if such a sense can be collected from their answers they should be admitted, otherwise rejected.

7. The remaining question to be considered, is that which relates to the propriety of the charge, which was refused as well as that which was given.

It is conceded by the counsel of the prisoner, and properly so in our opinion, that if the death [was accelerated by the violence of the prisoner, his guilt is not extenuated, although death might be, and probably would have been the result of the disease, which then afflicted the deceased.

8. But it is insisted that the Circuit Court, was wrong in assuming, that the prisoner was guilty of murder, when the crime, in the consideration of the jury, under the facts in evidence, may have been but manslaughter.

The evidence on which the charge was asked, is not stated but we must presume, from the absence of any request by the prisoner to modify the instructions, that they were warranted by the facts, and that their correctness in point of law was alone disputed.

The charge given to the jury, seems to be nothing more than a response to that which was requested, but refused.

We can perceive no other error in the decision of the several questions referred, than the admission of the infant without a satisfactory examination in open Court.

In consequence of the improper admission of this witness, the sentence must be vacated and the judgment reversed.

The prisoner to be kept in custody to await another trial, unless discharged by due course of law.

LITCHFIELD, USE, &C., v FALCONER.

1. Parol evidence is not admissible to contradict, vary, or materially affect, by way of explanation, a contract in writing, either in its terms, or *legal effect*.
2. *Semle*—Notwithstanding the usual expression of consideration, viz: "for value received," &c., the maker of a note may show, as against the payee, or other person standing in the same situation, that the note was given without consideration, or that the consideration has failed; or that a fraud was practised upon him; and under some circumstances, that the consideration was illegal.
3. As it is allowable for the maker of a promissory note to show the want, or failure, of consideration in an action against him, he must be permitted to prove the contract, viz: the inducements to the making and receiving the note.
4. Where part of a deposition is admissible evidence, and part not, upon an objection to the entire deposition, the court is not bound to distinguish between the legal and illegal testimony, but may overrule the objection generally.
5. Where a promissory note is payable on a day certain, it is not permissible to show, that by a verbal agreement made simultaneous with, or previous to, the time it was made, that it was agreed that payment should not be required until a more distant day, or the happening of a future event.
6. The endorsement of a promissory note is a sufficient consideration for a promise by the endorsee to pay the endorser an equivalent sum.

THE plaintiff in error brought an action of debt against the defendants in the Circuit Court of Greene, on a bill single, dated on the 7th day of February, 1836, for the payment of six hundred and seventeen 50-100 dollars, on the first day of January thereafter. The cause was tried on pleas which averred—1st. That the writing declared on, was executed

when said Allen proposed to sell said Litchfield a certain negro woman. The proposition was made at my house in Greene county, and sale confirmed for eight hundred dollars, payable out of the proceeds of a note Litchfield handed over at the time to said Allen; said note was for about twelve or thirteen hundred dollars, as well as is remembered, made by Willis A. Arrington and Anthony S. Arrington, and payable to James Battle. At that time, said Allen gave his note to Litchfield for the overplus of said note, with Alexander H. Falconer security. Said Allen was to retain the price of said negro out of said collection when effected, and then to pay over the surplus to Litchfield in discharge of the note he and without any consideration therefor; and 2nd. That the consideration on which the same was founded, had wholly failed.

On the trial, the plaintiff excepted to the ruling of the presiding Judge; from which it appears—First: That the Court, against the objection of the plaintiff, permitted the defendants to read the deposition of one L. L. Alsobrook; that the deposition was objected to, on the ground that the facts stated were inadmissible. The question to, and answer of, the witness are as follows: "Were you or not present at a trade made between Litchfield and Allen for a negro, which Litchfield bought of Allen; where was the trade made, and when, and what was the terms?" To this question the witness answered, that "he was, to the best of his recollection, present Falconer had given for such surplus. Said note so given by Allen and Falconer, was to be paid out of the overplus of money so to be collected of Arrington, as I remember the matter. I do not remember whether it was expressly stated that Allen and Falconer were not to be liable, unless the money was so collected of Arrington. All these things took place, I think, about the first of the year 1836, say January or February, possibly a little sooner or latter," &c.

Second: The plaintiff offered to read to the jury a regularly certified transcript of the record of a suit pending in the Circuit Court of Sumter, in favor of the defendant, Allen, against the plaintiff, upon his endorsement of the note of the Arringtons, referred to in the deposition of Alsobrook. To the introduction

of this transcript as evidence, the defendants objected, and their objection was sustained.

Third: The plaintiff then prayed the Court to charge the jury that, if they believed that Litchfield endorsed the note of the Arringtons to Allen, his endorsement might furnish a sufficient consideration for the note, now sued on; which charge the Court refused to give.

A verdict was found for the defendants, and judgment being thereupon rendered, the plaintiff has prosecuted a writ of error to this Court.

PECK for the plaintiff in error.

MURPHY & JONES for the defendant.

COLLIER, C. J.—It is insisted for the plaintiff, that the Circuit Court erred—1st. In admitting the deposition of Alsbrook to be read to the jury as evidence. 2nd. In rejecting the transcript of the record from the Circuit Court of Sumter, to shew the pendency of a suit in that Court in favor of the defendant, Allen, against the plaintiff. 3rd. In refusing to instruct the jury that, if they believed the plaintiff endorsed the note of the Arringtons to the defendant, Allen, “such endorsement might furnish a sufficient consideration for the note sued on.”

1. By a statute of this State, it is enacted, that whenever any suit is pending in any court founded on any writing under seal, it shall be lawful for the defendant, by special plea, to impeach its consideration in the same manner as if it had been sealed. [Aik. Dig. 283, sec. 138.] It was then competent for the defendants to plead either a want, or the failure of the consideration.

It is a settled principle, both in the English and American courts, that parol evidence is not admissible to contradict, vary, or materially affect, by way of explanation, a contract in writing. [Reading vs. Weston, 8 Conn. Rep. 121; Stevens et al. vs. Cooper et al., 1 John’s Ch. Rep. 425; Reed vs. Clark, 4 Mon. Rep. 20.] This rule rests upon the ground that written evidence is of a higher grade than the mere verbal declarations of witnesses; and consequently, where parties have agreed

upon the terms of a contract, which is afterwards reduced to writing, the verbal agreement is merged in the written contract. [Barber vs. Brace, 3 Conn. Rep. 9; Sommerville vs. Stephenson & Johnson, 3 Stew. Rep. 271; Mead vs. Steger, 5 Por. Rep. 498. See further the cases collected in 5 Am. Com. L. cases 174; Paysant vs. Ware & Barringer et al., Ala. Rep. N. S. 160; White vs. Beard, adm'r., Ibid 436.]

Notwithstanding the generality of the terms in which the principle is declared, it has been often held, that the maker of a promissory note, notwithstanding the usual expression of consideration, such as "for value received," &c., may show as against the payee, or other person standing in the same situation, that the note was given without consideration, or that the consideration has failed; or that a fraud in respect to it was practised upon him by the other party; and under some circumstances, that the consideration was illegal. The American decisions to this point are collected by the learned annotators upon Phillips' Evidence, Cow. & H.'s ed. 3 vol. 1458--9. See also Murchie vs. Cook & McNab, 1 Ala. Rep. N. S. 41; Simontons vs. Steele, ibid 357.

In Goddard vs. Cutts, 2 Fairf. Rep. 442, it is said that, when a note "has been made, executed and delivered as such, it is not admissible by law to look for any of its terms *aliunde*. They can be proved only by the instrument itself." [To S. P., Harris vs. Caston, 2 Bail. Rep. 343.] And it has been holden, that a note payable on demand, or on a specified day, cannot be varied in its operation by evidence of a previous, or contemporaneous, verbal agreement that the principal should not be called for, so long as the interest was punctually paid; or that it should be paid at another time, or in any other mode than it imported on its face. [Trustees, &c., vs. Stetson, 5 Pick. Rep. 506; Woodbridge vs. Spooner, 1 Chitty's Rep. 661; Dow vs. Tuttle, 4 Mass. Rep. 414; Fitzhugh vs. Runyon, 8 Johns' Rep. 375; Bradley vs. Anderson, 5 Vern. Rep. 152; Thompson vs. Ketcham, 8 Johns' Rep. 139.] So it has been decided that, where one adds, after the close of a promissory note signed by another, that he acknowledged himself to be bound as surety for its payment, he is considered as an original promissor; and parol evidence that he was to be liable to

pay, only on condition that the other promissor could not, is inadmissible. [Hunt vs. Adams, 7 Mass. Rep. 518; see also O'Hara vs. Hall, 4 Dall. Rep. 340; Clark vs. McMillan, 1 No. Caro. Law Rep. 265.] In *Sommerville vs. Stephenson & Johnson*, 3 Stewart's Rep. 271, it was held that parol evidence of an agreement, between the endorser and endorsees at the time of the assignment of a bond, that the latter should not require payment of the obligor within two years, was not admissible as an excuse for not employing due diligence, so as to charge the endorser. And in *Dupuy vs. Gray*, Minor's Rep. 357, which was also an action against the assignor of a bond, it was decided, that evidence of a verbal agreement, made at the time of the assignment, that the assignor was not to be liable until it should be ascertained by suit, that the money could not be collected of the obligor, went to vary and control the terms and legal effect of the contract in writing, and was consequently inadmissible. [See also *Wesson vs. Carroll*, Minor's Rep. 251; *Odam vs. Beard*, 1 Blackf. Rep. 191; *Butler vs. Suddeth*, 6 Mon. Rep. 541.] So the legal effect of written contracts cannot be varied or explained by parol evidence any farther than an express stipulation. [*Barringer et al. vs. Sneed*, 3 Stewart's Rep. 201; *La Farge vs. Rickert*, 5 Wend. Rep. 187; *Pattison vs. Hull*, 9 Cow. Rep. 747; *Creery vs. Holly*, 14 Wend. Rep. 30; *Hightower vs. Ivy*, 2 Porter's Rep. 308; *Simpson vs. Henderson*, 1 Mood & Malk. Rep. 300.]

Where the written agreement is equivocal, it is said the circumstances under which it was made, may be shewn in order to explain its meaning. [*Crawford et al. vs. Janets*, adm'r., 2 Leigh's Rep. 636; see also *ex parte Adney*, 2 Cowp. Rep. 460; *Haywood vs. Perrin*, 10 Pick. Rep. 228.] And a parol agreement, upon a sufficient consideration, made subsequent to the giving of a note, is admissible in evidence to vary its legal effect. [*Erwin vs. Saunders*, 1 Cow. Rep. 249; see 3 Phil. Evi. Cow. & H.'s ed. 1477, and cases there cited.] So a contemporaneous written agreement, connected with a note by direct reference, or necessary implication, may be resorted to, for the purpose of varying its legal effect and import. [Hunt vs. Livermore, 5 Pick. Rep. 395; *Davlin vs. Hill*, 2 Fairf. Rep. 434.] And if a note expressly refer to a verbal condition *ali-*

unde, without showing what the condition is, the condition may be proved, and thus annexed to the note. [Couch vs. Meeker, 2 Conn. Rep. 305.]

Having stated these illustrations and qualifications of the general rule, that parol evidence cannot be received to contradict, vary or materially affect, by way of explanation, a contract in writing, we proceed to consider whether the deposition read to the jury in the Circuit Court was improperly admitted.

The pleas were : *first*, that the writing sued on was executed without any consideration ; *second*, that the consideration had failed. These pleas are affirmative, and the *onus* of sustaining them by proof lay upon the defendants. To do this, it was indispensably necessary, that the circumstances under which the writing was made, should have been shown to the jury : otherwise it would have been impossible to show, either that there was no consideration, or that the consideration had failed. The deposition states the contract between the parties, and the inducements of the one to make, and the other to receive, the note, and thus far, it was clearly admissible. If it discloses other facts, which it was not allowable to show, these facts should have been specially objected to ; but the objection being to the entire deposition, the Court was not bound to distinguish between the legal and illegal testimony ; but finding a part of it proper, the refusal to reject the whole is not available on error.

The defendants, by their note, promise to pay on a day certain ; and any evidence tending to shew that it was previously, or simultaneously, agreed by parol, that payment should not be required until a more distant day, or until the happening of some future event, would be obnoxious to the objection of varying the written contract, and therefore inadmissible. If the note of the Arringtons was handed over to Allen without an endorsement, the defendants could not shew in their defence, that there was a verbal agreement between the plaintiff and themselves, that they should not be called on to pay their note, until an effort had been made to coerce a collection of the Arringtons : for, as this might not be done until their note had become due, such evidence would go to fix a day of payment different from that expressly stipulated by the parties.

So, if Allen received the note of the Arringtons with the general endorsement of the plaintiff, the defendants could not have shown that there was a verbal agreement simultaneously made, by which the legal steps, in order to charge the endorser, were to be dispensed with. The cases of *Sommerville vs. Stephenson & Johnson*, and *Hightower vs. Ivy*, already cited, are explicit upon this point. But it would have been competent for them to prove that the remedy against the Arringtons had been exhausted without obtaining a satisfaction of their note; for the consideration of the defendants' note would then have failed, and the liability of the plaintiff as an endorser, would have attached in favor of Allen, his endorsee. We have considered the defence upon the hypothesis, that the note of the Arringtons may not have been endorsed by the plaintiff; because the evidence on that point is not set out in the bill of exceptions.

2. If it appeared from the bill of exceptions, that the note of the Arringtons with the plaintiff's endorsement, had been given in evidence by the defendants, then the transcript of the record of the suit from the Sumter Circuit Court would have been unnecessary, if not inadmissible; but it does not appear that, that note was before the jury. It may have been that the note was produced and the endorsement was erased, so that it became necessary to show the fact by evidence *aliunde*. Upon either supposition, the transcript was admissible to prove that the note described in it had been endorsed; and it would have been competent for the plaintiff to identify it by other testimony. As the fact then proposed to be shown, was *prima facie* important to enable the plaintiff to rebut the defence set up, the rejection of the transcript is a fatal error.

3. The transcript being excluded by the Court, it does not appear that there was any evidence before the jury of the plaintiff's endorsement; had there been, the charge prayed should doubtless have been given. The transfer of a promissory note by endorsement, furnishes a sufficient consideration for a promise by the endorsee, to pay the endorser an equivalent sum, and the *onus* of showing a failure of consideration is then thrown upon the endorser.

We cannot think the bill of exceptions (though drawn out to an unnecessary length) states all the material facts which were proved at the trial, certainly not enough to present for revision all the questions intended to be raised. Upon the second point, the judgment is reversed and the cause remanded.

LUCAS v. HITCHCOCK.

1. When the judgment entry shows that the parties appeared, and there is a finding by the jury, this Court will presume it was on a proper issue, although no plea appears in the record.
2. When the judgment entry shows that the parties appeared, and the jury found for the defendant, and assessed damages in his favor, over and above the claim of the plaintiff, and the Court renders judgment in his favor for that amount, although no plea appears in the record, the judgment will be supported; it being a more reasonable presumption, that a plea was once filed, than that no plea ever existed in the cause, on which such a finding could be made.

Error to the Circuit Court of Mobile County.

THIS was an action of assumpsit commenced in the Circuit Court of Mobile County, by the plaintiff in error against the defendant in error. At the Fall term, 1838, a judgment was rendered, in favor of the defendant in the following words: This day came the parties by their attorneys, and thereupon came a jury, &c., who on their oaths do say, we, the jury find for the defendant; and assess his damages to twelve hundred and ninety-one dollars, over and above the claim of the said plaintiff. Therefore it is considered by the Court, that the plaintiff take nothing by his said action, but that the defendant go hence and recover of the plaintiff, the aforesaid sum of twelve hundred and ninety-one dollars, so assessed as aforesaid, together with his costs, &c. From this judgment the plaintiff prosecutes this writ of error, and now assigns for error, that there is no plea, on any thing in the record to sustain the judgment of the Court.

CAMPBELL, for the plaintiff in error, cited, 9 Porter 191; 3 Porter 387; 2 Stew. & Porter 141; 1 *ibid.* 159; 3 *ibid.* 433; 4 *ibid.* 145; 2 Stewart's 483—Aik. Dig. 231.

STEWART, *contra*, insisted that, according to the previous decisions of this Court, we must presume that there was an issue tried between the parties, which warranted the judgment.

ORMOND, J.—In this case a judgment has been rendered for a sum of money, in favor of the defendant and no plea is found in the record. A *certiorari* to perfect the record, has been sent to the clerk of the Court, by which the judgment was rendered; and he has returned, that no plea after diligent search in his office can be found. The statute of set off, Aikin's Digest 281, provides that, "if it appear to the jury that the plaintiff is overpaid, then they shall give in their verdict for the defendant, and withal certify to the Court, how much they find the plaintiff to be indebted or in arrear to the defendant more than will answer the debt or sum demanded; and it shall be the duty of the Court to enter up judgment for the amount so certified, for which execution may issue as in other cases."

As no other case exists, in which it would be proper to enter judgment for a sum of money in favor of the defendant, unless where the defendant under a proper issue, proved the plaintiff to be indebted to him in a sum larger than the claim sued on, the presumption is very strong, that such was the fact in this case.

The tendency of the decisions of this Court, for some years back, has been to presume, that those acts have been done, which though, they do not appear on the record, are supposed to exist by what does appear on the record. Thus in *Wheeler v. Bullard*, 6 Porter 352, there was no declaration in the record, but it was stated that the plea was withdrawn, and judgment rendered; and as there could not reasonably be supposed to be a plea, unless there was a declaration to plead to, the presumption was much stronger, that the declaration was lost from the files, than that it never had an existence. Had the judgment been by default, no such presumption could arise, and the want of a declaration would have been fatal. [*Price v. Cheevers*, 9 Porter 511.]

In *Castleberry v. Pierce*, 2 Stew. & Por. 141; it was held that, where the jury found *the issue in favor of the plaintiff*, this Court would presume that an issue had been in the files and lost. To the same effect is the case of *Wade v. Kilough*, 3 Stew. & Por. 434, and many subsequent cases.

In the case of *Jennings v. Cummings & Mason*, 9 Porter 310, there was a special plea, and also the pleas of payment

and set off. The entry was, the jury on the *issue* joined, found their verdict, and this Court held, that they would intend that all the pleas were before the jury, and that it was a clerical mistake.

These decisions evince the strong desire of this Court to prevent the reversal of judgments on a supposed state of facts, which other parts of the record are inconsistent with, and on presumptions which lose their force from the loose manner in which the papers of the cause are kept in many of the clerks offices.

In this case both parties appeared before the jury, who "find for the defendant and assess his damages to twelve hundred and ninety-one dollars over and above the claim of the said plaintiff." It would be most unreasonable to suppose, that in this case there was not an issue submitted to the plaintiffs, in which the defendant not only controverted the plaintiff's demand, but insisted that he was indebted to him. We have previously held that, where the parties appeared; and an issue was tried, we would intend that a plea had been filed, does it not flow from that decision, that we would suppose it to be the proper plea. The action in this case was *assumpsit*. Under the general issue, by giving notice, which need not appear on the record, the defendant would be entitled to an off set; it follows therefore, either that the parties went to trial on the general issue with notice, or on a plea of set off, or that the plea was waived. The present predicament of the record, can be explained on no other hypothesis, and in either event, the defendant is entitled to his judgment.

The judgment of the Court below is, therefore affirmed.

JOHN, A SLAVE v. THE STATE.

1. The act of 1836 which directs that, in capital cases, whenever points are reserved as novel and difficult for the decision of the Supreme Court, the execution of the judgment shall be suspended to a time, not less than twenty-five, nor more than forty days after the commencement of the next succeeding term of the Supreme Court, confers a right on the criminal, who is sentenced under such circumstances to the delay given by the statute; and a sentence fixing an earlier day for his execution is erroneous.
2. When more persons than one are indicted, and the venue is changed by less than the whole number, those who change the venue must be tried on a copy of the indictment; the original in such a case, remains in the Court, which retains jurisdiction over the one who does not change the venue.
3. When an order has been made on the change of venue by one defendant, for the transmission of the original indictment to another county, the Court retaining jurisdiction over the defendant as to whom the venue is not changed, may properly make an order to obtain the custody of the indictment so transmitted to another county, and proceed to trial against the defendant within its jurisdiction.
4. When the indictment is re-transmitted from the Court to which it was irregularly ordered, it is unnecessary that it should be certified by the clerk of the Court.

Writ of error to the Circuit Court of Sumter County.

At a former day in this term, a writ of error was awarded returnable *instantly*. The transcript now certified as the return to that writ, discloses that the plaintiff in error was indicted at the April term, 1839, of Sumter Circuit Court, for the murder of Daniel Hendrick. One count of the indictment charges William Ruff and William Anderson as assessories before the fact, and in subsequent counts, the charge is varied so as to make Ruff principal, and the others accessories.

The prisoners were arraigned, and pleaded not guilty, but the prosecution was continued over to the next term of the Court. At the October term, 1839, Anderson applied for and obtained a change of venue to Perry county. An order was then made, that a transcript of the record, as well as the original papers should be sent to the Circuit Court of Perry county. The other defendants then continued the prosecution over to the next term.

At the succeeding term in April, 1840, the Solicitor of the Circuit suggested, that the original indictment had been transmitted to Perry county, in pursuance of the former order of the Court, and moved that the Court would then award process, requiring the clerk of the Circuit Court of that county, to furnish the original papers to some person to be named in the order. The Court, thereupon, directed one John Hendrick to proceed to Perry county, and demand and receive from the Clerk the original indictment, and to bring the same to the Court then in session in Sumter county. This order was made without the consent of the plaintiff in error, and he objected to it. The order contained directions for swearing the messenger to bring the indictment sealed up, without any alteration, and without permitting any person to have the custody of it.

The messenger returned with the indictment in a blank envelope, and without any certificate from the Clerk of the Perry Circuit Court. The prosecution was then continued on the affidavit of the slave John.

At the next succeeding term, the plaintiff in error was tried on this indictment, convicted, and sentenced to be hung on Friday, the 22d January, 1841. A question was reserved at the trial, as novel and difficult, for the decision of the Supreme Court.

The following reasons are now assigned for the reversal of this sentence.

1st. Because the Court below erred in sentencing the plaintiff in error to be hung on the 22nd day of January, 1841, as twenty-five days could not intervene between that and the day of the commencement of the present term of the Supreme Court.

2nd. Because the said prosecution was discontinued.

3rd. Because the Court erred in making the order, directing the Clerk of the Circuit Court of Perry county, to return the original indictment to Sumter county, as the previous order for its transmission to Perry county, remained in full force, not revoked, or set aside.

4th. Because the Court erred in receiving back the indictment, unaccompanied and not authenticated by any certificate of the clerk of the Circuit Court of Perry county.

5th. Because the prosecution was discontinued, in consequence of the execution of the order, directing the transmission to Perry county, of all the original papers.

6th. Because the Circuit Court of Sumter had no jurisdiction of the prosecution, in consequence of the execution of the order, transferring all the original papers to Perry county.

The record was submitted for decision without argument.

ERWIN, for the plaintiff in error.

THE ATTORNEY GENERAL, for the State.

GOLDTHWAITE, J.—1. The statute of 1836, Aikin's Digest, 2 ed. 614, s. 1, directs that the execution of the judgment shall be suspended in capital cases, whenever points are reserved as novel and difficult, for the decision of the Supreme Court, to a time not less than twenty-five, nor more than forty days, after the commencement of the next succeeding term of the Supreme Court.

The statute is directory to the Circuit Courts; but in our opinion, it also confers a right on the unfortunate criminal, who is convicted under such circumstances, as to induce the presiding Judge to present his decision for the revision of the appellate tribunal. It was intended by this statute, to give ample time for the careful examination of the questions referred; but we are not authorized to say, even when such time is given, that the statute ceases to be obligatory. This Court commenced its present session on the fourth day of January, the earliest day appointed by law; the convict was sentenced to be executed on the twenty-second of the same month. It is therefore apparent, that only seventeen days could intervene between these days, when the shortest period permitted by the statute is twenty-five. It was erroneous not to suspend the execution of the sentence of death, inasmuch as a question was reserved at the trial for the subsequent decision of this Court.

We do not consider there was any erroneous action by the Circuit Court, in the other matters to which our attention has been called by the assignments of error.

2. The presiding judge, at the time of permitting the change of venue as to Anderson, was probably misled by the generality

of the rule of this Court, with respect to changes of venue. [Rule 20, S. & P. 12.] The rule was not intended to apply to criminal cases, where more persons than one are indicted, when one only shall apply for a change of venue. In such a case, if the accused makes out a sufficient cause, he is entitled by statute, to a change of venue; but the original papers of right appertain to the Court, which retains jurisdiction over such of the accused, as do not desire, or cannot procure a change of venue. A transcript of the record, which must necessarily include a transcript of the indictment, as well as of all other original papers, is all which can regularly be transmitted to the Court, to which the venue is changed. The accused, who under such circumstances, asks for a change of venue, may be tried on such a transcript, and his consent, if that is to be considered as essential, will be inferred from his application. If the practice was otherwise, the monstrous absurdity might result, that the prosecution against the others accused, might be terminated, or indefinitely delayed, by the measure of grace accorded the one, who sought elsewhere a trial which he might not obtain in an impartial manner in the county where the indictment was preferred.

We do not mean to be understood, that a prosecution must fail, if in such a case as this, the original papers instead of a transcript, are transmitted in consequence of an irregular order, such as we have noticed. The law of such a case can be determined when it shall arise.

3. The indictment, being properly a paper belonging to the files of the Circuit Court of Sumter county, could not be regularly removed from thence, unless the venue was changed by all of the accused; and therefore it was entirely competent for the Judge, presiding there at a subsequent term, to make any order necessary to insure the re-transmission of the indictment to the proper court.

4. For the same reason, we consider it not to be necessary that the Clerk of the Circuit Court of Perry county should authenticate the indictment by any certificate when he returned it to Sumter county, in obedience to the mandate of the Court.

In no aspect in which we view this case, can we arrive at the conclusion that it has been discontinued. It seems to have

been regularly continued from term to term, and nothing to the prejudice of the accused is shewn to have occurred, nor ought it to be presumed, from the temporary absence of the indictment. We are satisfied that none of the irregularities attending the change of venue by Anderson, have any effect on the regularity of this conviction.

For the error in not suspending the execution of the sentence for the proper period, the judgment of the Circuit Court is reversed, and the case is remanded, with instructions to the Circuit Court, to proceed to render judgment according to law on the verdict of the jury.

MIMS v. THE CENTRAL BANK OF GEORGIA.

1. In an action against the indorser of a promissory note, the declaration should alledge a demand, refusal and notice, or something equivalent.
2. The Courts of one State cannot judicially know what are the laws of another. If therefore, the *lex loci contractus* dispensed with the necessity of demand and notice, it should be alledged in the pleadings, that it may be proved if denied.
3. The common law of the State being derived from a common source, in the absence of proof to the contrary, it will be presumed to be the same in all.

THIS was an action of *Assumpsit* brought by the defendant in error against the plaintiff in the Circuit Court of Macon, as the last indorser of a promissory note of the following tenor, viz :

\$1,200.

November, 24th, 1836.

One hundred and eighty days after date I promise to pay to the order of W. Fleming, twelve hundred dollors, at the Central Bank of Georgia, for value received.

[Signed]

JAMES BUSSEY.

The declaration deduces the liability of the defendant from his indorsement, without alledging, either a presentment of the note for payment, or notice of non-payment. The defendan

below demurred to the declaration, but his demurrer was overruled. Thereupon the cause was tried on the general issue, which being found for the plaintiff below, and judgment rendered accordingly, the defendant prosecuted a writ of error to this Court.

BASCOMB, for the plaintiff in error.

HOWARD, for the defendant.

COLLIER, C. J.—The declaration in this case, if to be tested by the rules of pleading, applicable to suitors in general, is clearly defective. The contract of the indorser is conditional, depending upon the due presentation of the note to the maker, or its deposit on maturity, at the place where it was payable; and in the event of non-payment, prompt notice of its dishonor. Such being the nature of the undertaking of the defendant below, it was incumbent upon the plaintiff, to show that the condition on which his liability depended, had been performed; and being necessary to prove it at the trial, it was indispensable to the sufficiency of the declaration, that it should be alleged.

The indorsement of a note does not impose upon the indorser an absolute duty; it is mere inducement to his liability, and must be followed by some other acts, in order to charge him. A demand and notice or something equivalent, are the corner stones of the indorser's right of recovery. [Desborough v. Van Ness, 3 Hals' Rep. 231; Dwight v. Emerson, 2. N. Hamp. Rep. 159.] It is then clear, that a declaration, which sets forth the note and its indorsement, discloses merely a part of the cause of action, and not enough to entitle the plaintiff to judgment.

In the written argument admitted for the plaintiff in error, we are informed, that the declaration was sustained on the ground that the law of Georgia (of which State, the defendant is a corporation,) does not require the defendant, when the holder of an indorsed note, to give notice to an indorser, of a demand and refusal to pay.

Even if the declaration disclosed that the defendant in error was located in Georgia, and the indorsement there made,

we could not know that the law of that State relieved the defendant from the necessity of giving notice to an indorser. There is no allegation of what is the law of that State; if it is variant from that which prevails here, it was incumbent upon the defendant in error to have alledged in his declaration what was the law there.

The law merchant, which is part of the common law, imposes upon the holder of indorsed paper, the necessity of a demand and notice; and the Courts of one State cannot take judicial notice of the laws of a sister State, or of a foreign country, at variance with the common law. [Holmes v. Broughton, 10 Wend. Rep. 75, 78; Brown v. Gracey, 2 Dowl. & Ryl. Rep. 4, 1; N. A., and cases cited in 3, Phil. Ev. ed. of Cow. & Hill, 1137, 1138.] The common law of this State, in the absence of any thing appearing to the contrary, will be presumed to be the law of Georgia; the more especially, as our rules of decision, apart from legislation, are derived from the same common source. [3 Phil. Ev. ed. of Cow. & Hill 1138.]

If the defendant in error sought an advantage from the law of Georgia, the *onus* lay on him to show what the law was. [3 Phil. Ev. ed. of Cow. & Hill, 1136.] The declaration is not so framed as to show that it was insisted on, or to allow it to be given in evidence. If the declaration had been drawn in the usual form, we will not say that the *lex loci contractus* would not have been admissible, to show that the holder was excusable for an omission to give notice. [Kennon v. McRea, 7 Porter's Rep.] Be this as it may, it would certainly be most advisable, to make the allegations of the declaration conform to the proof.

The judgment of the Circuit Court is reversed and the cause remanded.

THE STATE v. PHILLIPS.

1. A writ of *venire facias* to summon a grand jury, directed "to any sheriff of the State of Alabama," if received, executed, and returned by the proper sheriff will be good.

Error to the Circuit Court of Madison County.

THE defendant was indicted in the Circuit Court of Madison County, for the murder of James Still, and found guilty by the jury. Previous to the sentence of condemnation, the prisoner moved in arrest of judgment, because the writ of *venire*, which issued to the sheriff to summon the grand jury, was, by the clerk, directed to "any sheriff of the State of Alabama." The writ was returned executed, by the sheriff of Madison County. The Court refused to arrest the judgment, but reserved the point for the revision of this Court, as one of novelty and difficulty.

HOPKINS & PHELAN, for the defendant, cited, 2 Porter 162; 1 Bro. & Bing. 12; 1 Chitty's Rep. 374; 3 East. 128; State v. Stedman, 7 Porter 495; 18 Johns. 212, 3 Johns. cases 265; 21 Vin. ab. 272, 295; 2 Porter 169; 1 Hale 475; 59 Foster 411, 12; 1 East. 310; 14 East 289; Cowper 65; Archbold Pl. 330; 4 Aik. Dig. 296, 624; Stephens' Criminal law, 186.

THE ATTORNEY-GENERAL & CAMPBELL, contra, cited 2 Hawkins 561; 3 Missouri Rep. 68; 1 Windell 117; 1 Chitty's Crim. law 308, 507; 1 Howard's Rep. 253; 3 *ibid.* 28; Cro. Jam. 528; 3 Stewart's Rep. 454.

ORMOND, J.—By an act of the Mississippi Territory passed in 1807, it was provided that there shall be drawn by the clerk and sheriff of the Superior Courts within this territory, in open Court, one by one after the same are shaken together, thirty six jurors, which shall be entered on the minutes of the Court; and the clerk shall issue a *venire facias* for the jurors so drawn,

returnable to the next term of said Court, and it shall be the duty of the sheriff," &c. [Aik. Dig. 296.]

From this citation, it is very clear that the Legislature required a writ of *venire facias*, to be issued by the clerk, for the purpose of summoning persons to compose the grand and petit jury; and it is therefore, wholly unnecessary to enquire how this matter stood at common law, as it is made necessary by the law just cited, and cannot, therefore, be disregarded.

It is however insisted, that this law has been repealed by the act to alter the mode of selecting grand jurors, passed Jan. 8th, 1836. The first section of the act provides, that the clerk of the Circuit Court, and sheriff, under the superintendence and inspection of the Judge of the County Court, shall select, from the whole number of persons qualified to serve on juries, twenty-four persons, best qualified in their opinion, to serve on the grand jury, which persons selected as aforesaid, shall be summoned by the sheriff, to serve as grand jurors, at least thirty days before the sitting of the Court. The second section repeals "so much of the existing law as requires grand jurors to be drawn by lot." (Aik. Dig. 624.)

No good reason is perceived why a writ of *venire facias* should issue to the sheriff, commanding him to summon persons as jurors whom he had himself selected, and whom he was by law required to summon. Whether this is a repeal of that portion of the act of 1807, which directs the clerk to issue a writ of *venire facias*, is not necessary now to be determined; because we are of opinion that the *venire* in this case is sufficient.

Conceding then, that a writ of *venire facias* should be issued by the clerk, the one issued in this case is sufficient? It is contended that it is bad, because improperly directed. That being directed "to any sheriff of the State" is improper, because no sheriff but the one in which the writ issued, could execute it. If it is very certain that, if the writ had been directed to the sheriff of any other County, than the one in which the writ issued, or, if any sheriff but the proper one had executed it, it would have been erroneous; but that is not this case. The direction to *any sheriff* of the State, must include the sheriff

of Madison; and as he received and executed it, we must intend that it was issued to him, the more especially, as it could not legally issue to any other sheriff, and it would be a violent presumption, that any other sheriff was intended. It is worthy of observation, that the law does not require the writ to be *directed* to the sheriff. It requires the clerk to issue it, and the sheriff to summon the jurors. We do not, however, lay much stress on this circumstance, although it is sufficient to show that, in the opinion of the legislature, the direction of the writ is not very material.

In the State v. Stedman, 7 Porter 495, the objection taken, was the precise converse of the proposition contended for in this case, as it was then insisted that the *venire facias* was bad, because not directed "to any sheriff of the State of Alabama."

This Court then held that the acts of 1836, did not apply to the writ of *venire facias*. But it does not follow from that decision, that such a direction was bad, or that any direction at all was necessary. Our opinion in this case is, that the writ was in effect directed to the sheriff of Madison, and being received, executed, and returned by him, it was sufficient.

This view of the subject, dispenses with the necessity of considering the question, whether under our statute law, the *venire* can be considered a part of the record, so as to be reached by a motion in arrest of judgment, and whether the objection should not have been taken by plea in abatement.

The judgment of the Court below is therefore affirmed.

HALSILL v. MASSEY.

1. When a judgment assumes to be founded on an award, neither the cause of action, endorsed on the writ, nor that disclosed by the declaration will be looked to, to support it. To sustain such a judgment, the order of reference must be shewn by the record.

Writ of error to the Circuit Court of Tuscaloosa County.

ACTION of debt. The cause of action endorsed on the writ, is a penal bond for one thousand dollars, conditioned that the said Halsill should stand to, and abide, an award of arbitrators, of a certain controversy, respecting a tract of land. The declaration is on a single bill for one thousand dollars. Judgment by default, was rendered at March Term, 1840, "for the debt and damages occasioned by the detention of the same; but, because it was unknown, what the debt and damages were," it was ordered, that they be inquired of by a jury, at the next term of the Court. At September Term, 1840, this entry was made: "Came the plaintiff, by his attorney, and moved the Court, that the award returned by the arbitrators in this cause, to the present term of this Court, be made final, for sufficient reasons appearing. It is therefore considered by the Court, that said award be made final, and that the plaintiff recover of the defendant, the sum of four hundred and fifty dollars, and forty-eight cents, the amount specified in said award, and that each party pay his own costs, about this suit expended."

The defendant prosecutes this writ of error, and assigns as error—

1st. The cause of action set out in the declaration, is a bill single, and the judgment is, that a certain award be made final.

2d. The judgment is not authorized by the previous proceedings.

3d. The Court rendered judgment without the intervention of a jury, on the order for the writ of enquiry; or without setting aside that order.

4th. No judgment could be rendered on the bond endorsed on the writ as the cause of action, without the assignment of breaches.

PECK, for the plaintiff in error.

No counsel appeared for the defendant.

GOLDTHWAITE, J.—In the aspect in which the case is presented by the record, we do not consider it important to enquire, whether the plaintiff was authorized to declare on a single bill, when the cause of action, endorsed on the writ, is a penal bond; because the final judgment does not assume to be founded on either the one or the other, but is, in fact, founded on an award.

It does not appear, however, that any reference of the cause was ever made to arbitrators, and consequently, there is nothing to support the judgment.

Let it be reversed, and the cause remanded.

HODGES & PUCKETT v. ASHURST & SONS.

1. Where a power of attorney was copied at length into the transcript of the record, authorizing the confession of a judgment, but was not, by order of Court, or otherwise, made a part of the record, it cannot be regarded as such an error.
2. It is competent for a Court, having jurisdiction of the subject matter, to receive the confession of a judgment, though no suit had been commenced.

Writ of error to the Circuit Court of Lawrence.

In the transcript, a power of attorney, purporting to have been executed by the plaintiffs in error, on the 3d December, 1839, is set out at length. This power of attorney authorizes the attorneys therein named, or either of them, to confess a judgment for the plaintiffs, in favor of the defendants; but as it is not considered by the Court as a part of the record, it is deem-

ed unnecessary to recite it more particularly. No writ was issued, or declaration filed, in the Circuit Court, but the only proceeding there had, is in these words :

“ Richard Ashurst & Sons,

vs.

Fleming Hodges, & Rickard Puckett. }
}

Came the plaintiffs by attorney, and produce in Court a power of attorney, made by the defendants under hand and seal, dated, 3d day of December, 1839, and witnessed by John M. Jackson, authorizing and requiring the said John M. Jackson, and Wiley Galloway, or either of them, to confess a judgment against the defendants aforesaid, in favor of the plaintiffs, for the sum of fifteen hundred and eleven, and twenty-eight one-hundredths dollars, together with the interest, making in all, seventeen hundred and two, and forty-eight one-hundredths dollars, and the signatures being proved to be genuine, and the aforesaid John M. Jackson, now in open Court, under said power of attorney, here confesses judgment as aforesaid. It is therefore considered by the Court, that the plaintiffs recover of the defendants, the sum so confessed, besides their costs expended. And the plaintiffs here consent to a stay of execution, until the 1st day of August, 1840.”

This judgment was rendered at the March term of the Circuit Court of Lawrence, holden in the year, 1840.

ROBINSON, for the plaintiff in error.

HOPKINS, for the defendant.

COLLIER, C. J.—So many of the errors assigned, as refer to the power of attorney copied in the transcript, cannot be noticed. That paper is not necessarily a part of the record, and not being so made by order of the Circuit Court, we are not authorized to look to it, for any purpose.

In respect to the sufficiency of the judgment, it may be remarked, that it is competent for a Court, having jurisdiction of the subject matter, to receive the confession of a judgment, though no writ, or other proceedings, have been had in the case. (Coller v. Denson, Minor's Rep. 19.) So a judgment may be confessed by an attorney at law, and it will be regular,

though the entry does not shew that he produced a written authority from the defendant, authorizing it. (Hill v. Lambert & Brothers, Minor's Rep. 91. See also, Gayle & Foster, Minor's Rep. 125.)

In the case at bar, the judgment entry is very inartificial, and untechnical, yet we think it may be sustained. It recites a written authority to the attorney, to make the confession—the proof of that authority, and the sum for which the judgment was to be rendered. This seems to have been followed in the *cognovit*, and entry, which gives effect to it.

It would certainly be a safer practice, where a judgment is confessed under a letter of attorney, to set out the authority *in extenso*, that the regularity of the proceeding may appear from an inspection of the record, yet, as no rule of law requires this, we cannot say that the confession was unauthorized, where the judgment contains all the essentials, requisite to its validity.

The judgment then, being confessed by a person duly authorized, and for a sum certain and proper, operates as a release of errors; (Aikin's Dig. 266,) and is therefore affirmed.

THE STATE v. BROOKSHIRE.

1. The question of change of venue, is one addressed to the sound discretion of the court to which the motion is made, and therefore cannot reviewed in an appellate court.
2. Witnesses who are present when the other witnesses are sent out under the rule, cannot be examined as a matter of right, and from the operation of this rule attorneys at law are not excluded.
3. If a witness, sent out under the rule, returns of his own accord, or if a witness should arrive pending the trial, and hear the testimony, or a part of it, their introduction as witnesses will depend on the discretion of the court.

Error to the Circuit Court of Madison county.

THE defendant was indicted in the Circuit Court of Madison of the murder of Samuel Hudson; and being found guilty by the jury, moved in arrest of judgment, because the writ of *venire* issued by the Clerk to summon the grand jury, was directed to any sheriff of the State of Alabama, which motion the Court overruled.

At the same term at which the indictment was found, the defendant, by affidavit, alledged that he could not have a fair and impartial trial in Madison county, owing to the excitement and prejudice against him, and that the same causes operated in the counties of Limestone and Morgan. The Court granted a change of venue, and ordered the same to the county of Lawrence, which was not acceded to by the attorney for the defendant, and the cause was continued.

Previous to the trial of the cause, the witnesses for the State and the prisoner were put under the rule of separation, and after the examination of the witnesses, an offer was made on the part of the defendant to introduce two witnesses, who were two of the defendant's counsel, to prove a fact considered somewhat material for the defence; which was refused by the Court, because they were present in Court during the examination of all the other witnesses; and because, at the time the other witnesses were put under the rule, no exception was made in favor of these two witnesses. But the question of their rejection being by the Court considered novel and difficult, as also the question arising on the order made by the Court on the motion for a change of venue, and the motion in arrest of judgment, the points of law arising thereon, are reserved for the revision of this Court as novel and difficult.

MR. HOPKINS and MR. PHELAN, for the defendant, cited the same authorities as in the case of the State vs. Phillips.

THE ATTORNEY GENERAL and MR. CAMPBELL contra.

ORMOND, J.—The question arising on the direction of the *venire facias*, issued to summon the grand jury, has been fully considered in the preceding case of the State vs. Phillips, and shown to be sufficient.

By our statute, Aik. Dig. 285, the Courts are empowered, on the affidavit of the defendant in a criminal case, setting forth

that he cannot have a fair and impartial trial, to change the venue "to the nearest adjoining county, free from the like exceptions." The defendant, in his affidavit, stated that Limestone and Morgan counties were subject to the same exceptions as Madison. No exception is taken to Jackson county, which adjoins Madison county.

The order of the Court was that, the venue be changed to Lawrence county, the boundaries of which nowhere touch the county of Madison. We are not however called on to decide whether the venue could have been changed to Lawrence county, as the proposition to change the venue to that county was not acceded to by the defendant, and he cannot therefore revise that decision; because, whether erroneous or not, it did not work any prejudice to him. The whole matter must of necessity rest in the discretion of the Court, to be exercised under a view of all the circumstances, and cannot be re-considered in this Court.

The manifest design of separating the witnesses from those under examination, is to secure an impartial administration of justice by preventing concert of action among them; but from the operation of this rule, it appears, attorneys will be excluded, if they are mentioned as witnesses when the other witnesses are sent out. [5 Carr & Payne 91.] But if not so excepted, and he hears the testimony, he will not be allowed to give evidence. [Rex vs. Webb, cited in 3 Starkie's Ev. 1733.] If a witness, put under the rule, returns of his own accord and hears the testimony, or if witnesses should arrive at the courthouse and hear the testimony, or a part of it, before they are discovered, it will be in the discretion of the Court to permit them to testify or not. But as it would be a great hardship to deprive a party of the benefit of his witnesses when he has himself been in no default, the permission ought to be given, unless there be some peculiar circumstances forbidding it, which the Court, in the exercise of a sound discretion, will determine. [Beaman vs. Ellice, 4 Carr & Payne 585, and Rex vs. Colley, 1 Mood. & Malk. 329.]

It appears, therefore, that, as the attorneys of the defendant were not excepted from the operation of the rule when the other witnesses were sent out, there was no right to examine

them as witnesses in the cause ; but that their introduction depended on the discretion of the Court under a view of all the circumstances of the case ; and we cannot say that this discretion has been unwisely exercised.

The judgement of the Court below is, therefore, affirmed.

REESE v. WHITE.

1. The return by the sheriff of *no property* to an execution, at the suit of the endorsee against the maker of a promissory note, is conclusive to fix the liability of the endorser when the other requisitions of the statute have been complied with. And such return may be made at any time after the reception of the execution by the sheriff, who is liable to the endorser if the return is falsely made.

Writ of error to the Circuit Court of Lawrence county.

ACTION of assumpsit, commenced on the 16th of September, 1839, by White the endorsee of a promissory note made by John C. Price & Co. payable to Price and Puckett, and by them endorsed, against Reese, a subsequent endorser. The declaration describes the note as being dated the 1st of March, 1838, payable ten months after date. The several endorsements are alledged to have been made before the maturity of the note. The declaration alleges that, when this note became due, the plaintiff, as endorsee, brought his suit against the makers in the County Court of Morgan, returnable to third Monday of February, 1839, which was the first Court to which the makers could be sued, and prosecuted the same to judgment at the June term, 1839. The amount of the judgment is stated, and the record vouched. It also alleges that, on the 15th of August of the same year, the plaintiff caused a writ of *fieri facias* to be issued on the said judgment, and delivered the same to the sheriff of Morgan county, who, on the 7th of September of the same year, returned the said writ *no property found*. It

then concludes with a *super se assumpsit* for the amount of the note, and with the usual breach.

The defendant demurred to the declaration, but the demurrer being overruled, he then pleaded the general issue; on which a verdict was found and judgment rendered for the plaintiff.

The defendant prosecutes the writ of error, and assigns that the Circuit Court erred in overruling the demurrer.

ROBINSON, for the plaintiff in error, insisted that the action was premature, inasmuch as the *fi. fa.* was not returnable until February, 1840. The return of the sheriff made prior to the proper time ought not to prejudice the endorser. The intention of the statute is to substitute the return of *no property*, in the stead of demand and notice; but the endorser is entitled to have the execution retained so long as it can have any legal effect. [Cavanaugh vs. Tatum, 4 S. & P. 204.]

A similar rule to that which prevails when equitable assets are sought to be subjected to a judgment at law, ought to be recognized in this case as necessary to charge the endorser. In equity, the creditor must exhaust his legal remedies. [4 John. Chan. 671, 681, 691.] Notwithstanding the return day of the execution has passed, yet the creditor cannot go into chancery unless the execution is in fact returned. (1 Paige Ch. 305, 308.) So likewise, if the execution is returned *before* the return day, the creditor cannot go into chancery. 3 Paige Ch. 311.

He also cited 3 Bibb 227, and 2 H. & M. 105, to shew what are considered to be the rights of an endorser in Kentucky and Virginia.

HOPKINS, for the defendant in error, relied on the statute, Aikin's Digest 330, to shew that the return of the sheriff was conclusive. If false, the endorser has his remedy by action. The sheriff, in this State, is not tied down to the return day of the writ to make his return, but he is required by the statute to make it at least three days previous thereto. (Aikin's Digest 279, s. 119.)

There is a strong analogy between this case and that of bail, who may become liable by the return of the *ca. sa.* made at any time. (3 Burr. 1360; 2 Sell. Pract. 46.)

GOLDTHWAITE, J.—The requisites to charge the endorser of a note, of the description stated in the declaration, are defined with much precision by the statute. When the sum due on the note is more than fifty dollars, the endorsee must commence a suit against the maker, at the first term of any Court of the county where he resides, to which it can be brought. Judgment must be recovered, and a writ of *fieri facias* returned by the proper officer, *no property found*. (Aikin's Digest 330, s. 12, 16.)

These matters are evidently intended to stand in the place of the demand of payment from the maker, and the notice to the endorser, which were previously required by the law merchant. It seems to have been intended also, to establish a fixed and definite rule, by which every one might easily know his own liability, or enforce his claims against others. The statute does not make the liability of the endorser depend on the insolvency of the maker. This it might be difficult to establish with certainty, and it might in all cases be made the subject of dispute; therefore, the enactments have made the return of *no property* to a writ of *fieri facias*, one of the essential matters to fix the liability of the endorser. If the time when this matter was to be ascertained, had been considered as important, the Legislature doubtless would have determined it by some precise rule; but this has not been done, and we can perceive no good reason why it should be extended beyond the period enacted by the statute, which we consider to be the date of the return.

The essential matter to be ascertained by the return, is that the maker of the note has no property to satisfy the judgment; and this can be as well ascertained at one time as at another. Whenever the proper officer can truly make this return, he is authorised to make it; and thereupon the liability of the endorser becomes complete, if the necessary steps have been pursued.

There is a striking analogy between the contract of bail and the contract made by an endorser, under these statutes. The former agrees to surrender his principal whenever a *ca. sa.* shall issue. The latter contracts that the maker will have a

sufficiency of property in the county of his residence, to satisfy the judgment which the endorsee may obtain against him, provided he sues to the first term of the Court. In either event, the return of the sheriff is conclusive; and in the case of bail, the *ca. sa.* may be returned at any time. We can perceive no good reason why the analogy should not hold with respect to the return of the *fi. fa.* when the object is to charge the endorser. If the execution is issued, within a short time previous to the term of the Court to which it is returnable, no one would suppose the return, when properly made in that event, would be insufficient to charge the indorser; and why should it be, after the same time has elapsed, but the return is made before the return day? The fact to be ascertained by the return is, that the maker of the note *has* no property, and it is immaterial *when* he became in this condition; because, whenever he is thus, the liability of the endorser attaches.

Most of the reasons adduced by the counsel for the plaintiff in error, would be equally forcible to show that the return to the sheriff might be impeached, if the object of these statutes is to give time to make the money from the property of the maker. The case of Goodell vs. Stuart, 2 H. & M. 105, is decisive, however, to shew that the return, whether true or false, ascertains the liability.

We have not adverted to the cases in chancery cited from Paige, because there is a material distinction between the ascertainment of a liability, in the mode appointed by the statute, and the pursuit of an equitable remedy. In the first, the rule is fixed and arbitrary, whilst in the latter, it is dependent on a long course of decision peculiarly connected with the jurisdiction of the Court.

If the sheriff, in a case like the present, makes a false return, and thereby a liability is cast on an endorser, he has a clear remedy; and this would be so without reference to the time when the return was made.

We entertain no doubt of the correctness of the decision of the Circuit Court, and its judgment is affirmed.

HUFF ET AL. v. COX.

1. Where the defendant adduces no evidence, and that on which the plaintiff relies, either in whole or in part, oral testimony, or depositions, it is error for the Court to charge the jury that the evidence of the plaintiff, is sufficient to authorise a recovery; unless it is overbalanced by the proof of the defendant. Such a charge assumes the credibility of the witnesses—a question which should be referred to the jury.
2. On the trial of the right of property under the statute, the plaintiff cannot be required to produce the judgment on which his execution issued, nor can the claimant be allowed to show the same to be an insufficient warrant for an execution.
3. Where the same individual is both Clerk and Judge of a Court of record, it is competent for him, under the act of Congress of 1790, to authenticate, by his attestation and certificate, the records and proceedings of his own Court.
4. Where an authenticated copy of a will from the Court of a sister State, was recorded in the Clerk's office of a County Court of this State, but without any view to its execution here—*held*, that an authenticated transcript from the records of the County Court, was inadmissible evidence—the record itself being but the copy of a copy.

THIS was a case of the trial of the right of property, under the statute, in the Circuit Court of Cherokee. From the record, it appears that a *fieri facias*, at the suit of the defendant in error against William Hall, was placed in the hands of the sheriff of that county, and was levied on two slaves, viz: a woman named Edy, and a boy named Wiley, as the property of the defendant in execution. The plaintiffs in error thereupon made oath, as required by law, that the slaves were their property, and executed a bond with surety to try the right. An issue was made up, and submitted to a jury, who found the slaves subject to the execution, &c.

On the trial, the claimants excepted to the ruling of the Court touching the admissibility of evidence, as also in charging the jury. From the bill of exceptions, it appears that a witness introduced by the plaintiff in execution, proved that the defendant in execution removed from South Carolina to his neighborhood, in Cherokee county, in 1835, and that the negroes in controversy had been in his possession ever since. The claimant's counsel moved the Court to charge the jury, that the burthen of

proof was on the plaintiff in execution, and that, unless he proved that the property in question was owned by the defendant in execution, they must find for the claimant; whereupon the Court charged, that it was true that the burthen of proof lay upon the plaintiff, but that his proof was sufficient to authorise a recovery, unless it was overbalanced by the proof of the claimant.

The claimant then asked the Court to charge the jury that, unless the plaintiff proved an unsatisfied outstanding judgment against the defendant in execution, they must find for the claimant; which charge the Court refused to give, and charged the jury that the execution, which had been levied on the property in question, was sufficient evidence of that fact.

In the progress of the trial, it was proved, on the part of the claimants, that Merry Hall, the father of William Hall, the defendant in execution, was the owner, and in possession of, the slaves in controversy; and then offered to prove that he made a will, by which he bequeathed them to the children of Milly Hall, the wife of the defendant—that the claimants, with the exception of Huff, are the children of Milly Hall, and that Huff has intermarried with one of them. The will offered was authenticated by a certificate, in the following words:

“THE STATE OF SOUTH CAROLINA. }
GREENVILLE DISTRICT. } ”

I, John Watson, the presiding Judge of the Court of Ordinary, in and for the said District aforesaid, and also Clerk of the said Court, do hereby certify that, the foregoing writing is a true copy of the original will of Merry Hall, late of said District, deceased, which is proved and recorded in the Ordinary's office for said District; and that the above attestation is in due form, and that full faith is, and ought to be given to the same. Given under my hand and private seal, having no public seal of office, at Greenville, this 20th day of November, A. D. 1837.

Attest:

JOHN WATSON, Judge and Clerk
of the Court of Ordinary.”

This attestation is followed by a certificate of one of the Judges of the Court of Common Pleas of the State of South Carolina, in which it is stated that, John Watson was, at its date, Clerk and Judge of the Court of Ordinary for the District

of Greenville, in that State, and that his attestation is in due form. The counsel for the plaintiff in execution objected to the introduction of the will as evidence; and his objection was sustained by the Court.

The counsel of the claimants then offered to read to the jury a copy of the same will transcribed from the records of the Clerk of the County Court of Cherokee; to the admission of this evidence the plaintiff also objected. His objection was sustained, and the paper excluded by the Court.

Judgment being rendered against the claimants, they have prosecuted a writ of error to this Court, and now insist that the Circuit Court erred in its decision of the several questions of law presented by the bill of exceptions.

WM. B. MARTIN for the plaintiff in error.

No counsel appeared for defendant.

COLLIER, C. J.:—1. Although it is said that it was proved, that the defendant in execution, brought with him from South Carolina, and still retained in his possession the slaves in question; yet we are to understand, that the witness only testified that such was the fact; whether it was shown satisfactorily to the jury, was a matter of which they were the exclusive judges. The Court however, in its charge, assumes that this evidence is indisputable; for the jury are informed, that it was sufficient to authorise a verdict in favor of the plaintiff in execution, unless it was over-balanced by the proof adduced by the claimant. It is the acknowledged office of the Judge, to expound the law, and the jury are to ascertain the facts; and if the Judge refer his duties to the jury, or undertake to perform theirs, in either case he commits an error. (*Pistole v. Street*, Ad'mx., 5 Por. Rep. 64.) In the case before us the Judge determined a fact adverse to the plaintiff in error, and in so doing, as we have shown, invaded the prerogative of the jury.

2. In *Carlton et al. v. King*, 1 Stewart & Porter's Rep. 472; it was decided that the claimant of property could not require the plaintiff to produce the judgment on which his execution issued, nor could he be permitted to point out defects in it, though there might be such as would show it to be an insuffi-

cient warrant for an execution. This case has been recognized as authority by several later decisions, and is decisive of the second question raised. (See also, *Collingsworth v Horn*, 4 Stew. & Por. Rep. 237; *Perkins & Elliott v. Mayfield*, 5 Por. Rep. 182.)

3. In *Dozier v. Joyce*, 8 Por. Rep. 303, a will was certified by the Ordinary of the district of Edgefield, in the State of South Carolina, in terms very similar, and certainly not more comprehensive than those employed by the Ordinary in the present case. There the Court said, "the act of Congress, of seventeen hundred and ninety, providing for the authentication of the records and judicial proceedings of the Courts of any State, by the attestation of the clerk, with the seal of the Court annexed, together with the certificate of the presiding Judge, must be held to reach such a case as this, or it is not provided for, as the act of eighteen hundred and four, for the authentication of records not judicial proceedings, will not apply. The decision on the probate of a will, is a judicial proceeding, and the Court in which it is registered a Court of record; and if the presiding Judge is also clerk of the Court, he must have authority to attest the records of his Court in both capacities. This has been done in this case." This reasoning is conclusive to show that the will was sufficiently authenticated, and should consequently have been admitted as evidence.

4. The transcript of the will from the records of the clerk of the Court of Cherokee, was clearly inadmissible. In the first place, we have no statute authorising the registry of a will proved in another State, consequently its registration here, would not impart to the original will authenticity when offered as evidence in our Courts, unless it was first proved here, with a view to execute its provisions. In the second place, the paper offered was a copy from the record, which was itself a copy, and for this cause it was also objectionable.

For the error in the *first* and *third* questions considered, the judgment of the Circuit Court is reversed and the cause remanded.

WILLIAMS & BATTLE v. JONES, GUARDIAN.

1. The interest which will disqualify a witness must be an interest in the event of the cause; an interest in the question is not sufficient, nor can the objection be raised by the witness himself.
2. A deed may be properly registered upon the acknowledgement of the grantor alone.
3. A debtor has the right to prefer one creditor to another; that the grantor is indebted at the time of making the deed, or that it is made on the eve of judgments being obtained against him, are badges of fraud merely, and do not necessarily render it inoperative.
4. The equity of the maker of a deed accompanied by possession, may be sold under execution; but it seems that a Court of Chancery would be authorised to interfere, and ascertain and separate the interests of the mortgagor and mortgagee or maker of the deed, and *cestui que trust*.
5. A finding by a jury on a trial of right of property, in favor of the plaintiff in execution, is a condemnation of the property absolutely in discharge of the plaintiff's execution.

Error to Henry Circuit Court.

THIS was a trial of right of property in the Circuit Court of Henry County, in which the defendant in error was plaintiff in the execution, and the plaintiff in error Williams, trustee of Thomas Battle claimant. The jury found for the plaintiff in execution, and subjected a negro man and a bay mare to the payment of the plaintiff's execution. An agreement was entered into in the Court below, that fifteen other cases depending between the same parties, should abide the judgment in this case.

During the trial in the Court below, as appears by a bill of exceptions, the claimants, having proved its execution by one of the subscribing witnesses, offered in evidence a deed of trust and the certificate of probate thereto annexed, which deed bore date on the 4th September, 1839, and was made by Elijah Frank, the defendant in execution, by which a large amount of property was conveyed to the plaintiff in error Williams, as trustee for Thomas Battle, to secure the payment of debts due from Frank to Battle, and to secure Battle against liabilities

for Frank, as his surety on three bonds for twenty thousand dollars each.

On the deed was a certificate of the clerk of Henry County, that Elijah Frank appeared before him, on the 2d October, 1839, and acknowledged that he signed, sealed and delivered the deed, for the purpose therein specified, and that the deed was recorded on the same day; and also proved that the deed was recorded within twenty-eight days after the date of the deed.

The claimant offered to prove by the County clerk, that all the parties to the deed of trust, appeared on the day of the date of the certificate, and severally acknowledged the deed in the terms prescribed by law; and moved the Court to permit the clerk to amend his certificate according to the fact, which the Court refused, and the claimant excepted to such refusal as error.

It was also proved, that the deed was executed on the day it bore date. The consideration mentioned in the deed was also proved, that the present contingent liabilities of Battle, to be protected by the deed, amounted to fourteen thousand dollars; and that the property conveyed by the deed was worth ten thousand dollars. Actual notice of the deed of trust in September, 1839, and previous to the rendition of judgment, was proved to have been had by the plaintiff in execution. No other evidence was offered as to the time when the debt of plaintiff in execution had its inception, except the judgment and the service of the summons, which was spoken of by one witness.

The claimant offered as a witness, one of the co-defendants to the judgment against Frank, the defendant in execution, who being sworn on his *voir dire*, answered, that he was interested to make the property subject to the execution, and that he was not bound to swear against his interest; upon which he was excused by the Court from giving testimony in the cause, to which the claimant also excepted. Upon the evidence the Court charged the jury—

That the deed not being acknowledged by all the parties to it, the registration was not constructive notice under the statute;

but also charged, that actual notice would dispense with registration.

That, although the deed was duly recorded, and in other respects unimpeachable, yet it would be inoperative as to creditors whose debts existed anterior to the execution of the deed of trust, and refused to charge, that the date of the judgment was the time when the plaintiff in execution, because a creditor, but that the jury might find that the plaintiff, was a creditor anterior to that time, if there was any evidence of a previous debt on which the judgment was founded.

That in regard to the effect of the deed of trust, a legal title, subject to execution, must at all times exist in all personal property in some one; that in this case such title must be either in the trustee, in Battle, or in Frank, the defendant in execution, and some evidence having been given, that the property levied on, was at the time of the levy in the possession of Battle, the charge was qualified by the instruction, that if Battle was in possession, and the deed otherwise unexceptionable, the property was not subject to the execution.

The Court charged that trust estates, such as the present, did not differ from mortgaged estates, and the vendor remaining in possession, the property was subject to execution against him.

That, under the issue joined, should a verdict be for the plaintiff, Battle would not be concluded; that his lien would not be lost, and that purchasers, under execution predicated on such finding, would take the property subject to the lien created by the deed, if in fact, it created any. To all which charges and refusals to charge, the claimant excepted; and now assigns the matters of law arising thereon as error; and second, that the issue tendered by the plaintiff was improper, as it sought to condemn the whole property, and not merely the equity of redemption. The case was submitted without argument.

Buford, for the plaintiff in error.

Peck & Clarke, contra.

ORMOND, J.—The questions of law presented on the record are,

First: was the co-defendant of Frank the defendant in execution, properly excused from giving evidence, on the ground that he could not be compelled to swear against his interests.

Second: was the acknowledgment of the deed of trust, by the grantor, sufficient to authorise its registration.

Third: was the deed of trust inoperative, as to all creditors whose debts existed anterior to the execution of the deed of trust.

Fourth: Can the interest of the grantor in a deed of trust be sold under execution, he being in possession of the property.

Fifth: What is the effect of a verdict on the trial of the right of property; does it condemn the property absolutely to the payment of the execution, or only such estate as the grantor has in the property?

These questions will be considered in the order here presented.

1. The interest which will disqualify a witness, must be an interest in the event of the suit, by which he may obtain an advantage. If he is called to testify against his interest, he is certainly as competent as if he stood indifferent between the parties. The witness was a co-defendant of Frank in the original judgment; and the supposed interest is, that the witness himself is interested in subjecting the property levied on, to the payment of the judgment, as otherwise he might be called on to pay it himself. But it is not the privilege of a witness to object, but of the party against whom he is called on to testify.

A witness cannot be called on to testify, when his testimony would expose him to a criminal charge, or to a penalty; and it may be doubtful whether he could be called on as a witness, when his testimony would subject him to a civil action, or charge him with a debt, though the better opinion seems to be, that he would be compelled to answer in such a case. To satisfy the scruples of some of the English Judges on this point, the 46th of George 3d was passed, which declares that a witness shall be compelled to answer in such a case. The disqualification, arising from interest in the event of the cause, is not an

objection which can be raised by the witness, but by the party against whom he is called on to testify, and then only when he is called to swear in favor of his interest.

2. Deeds of trust of the description set out in this record, are by law, required to be proved or acknowledged, within thirty days from the time of their execution, and recorded. It appears that this deed was acknowledged before the clerk, and left with him for registration within this time; but it was rejected by the Court, because it did not appear by the certificate of the clerk, that the trustee and *cestui que trust* had also acknowledged it, although such was the fact; and a motion was submitted to the Court, that the clerk be permitted to amend his certificate so as to correspond with the truth of the case. It would be very strange, if the omission of the clerk to perform a mere ministerial act, could prejudice the rights of the parties; but it is not necessary now to decide the question, because the acknowledgement by the grantor, satisfied the requisition of law, as was held at this term in the case of *Bradford v. Campbell*, and repeatedly before in this Court.

3. The fact that a person making a deed of trust to secure one creditor, is in debt at the time, or that the deed is made on the eve of judgments being obtained against him, are certainly *badges of fraud*, which throw suspicion over the transaction; but it does not necessarily render the deed inoperative, as there can be no doubt, that a debtor has the right to prefer one creditor to another, and the deed made *bona fide* to secure or discharge a real indebtedness, should be supported.

The Court therefore erred in the charge given; but did not err in the refusal to charge that the date of the judgment was the time when the plaintiff in execution, became a creditor; whenever it became important to ascertain that fact, it would be referred to the creation of the debt, of which the judgment would be conclusive evidence.

4. In the case of *Perkins & Elliott v. Mayfield*, 5 Porter 182, the precise question here raised, was determined by this Court in which it was held, that a mere equity, unaccompanied by the possession of the property, could not be sold by execution; but that the equity of the maker of a deed of trust, accompanied by possession, could be thus sold

If this question was presented to this Court for the first time, considering the amount of property thus held, and the embarrassing effects which must result from a sale under such circumstances, we should hesitate long before we gave it our sanction. The most obvious effects are, the sacrifice which must attend sales of property to which only an imperfect title can be conveyed by the sheriff, the value of which it may be difficult to ascertain, and the danger to which the mortgagee or the person beneficially interested, is exposed by the property being sold to different persons, and carried to different parts of the State, and perhaps out of the State, not to mention the difficulties which would attend a redemption of the property from the same causes.

We do not feel our ourselves authorised to depart from the decision, referred to, of Perkins & Elliott v. Mayfield, and that of McGregor & Darling v. Hale, and other cases which preceded it, and on which it was founded, although they lead to the consequences, we have stated; they have been too long acted on, and acquiesced in to be now disturbed.

These considerations would, in our opinion, authorise a Court of Chancery to interfere before the sale, for the purpose of ascertaining, and separating, the interests of the mortgagor and mortgagee, or of the maker of a deed of trust, and the *cestui que trust*. No injury could result to the plaintiff in execution, whom it would be the duty of the Court to require the party seeking its aid, to indemnify by adequate security.

5. The issue in this case was general, the plaintiff affirming and the claimant denying, that the property was liable to the execution. The effect of a finding in favor of the plaintiff, by the jury, was a matter with which they had no concern; their duty was discharged by passing on facts, and finding according to the truth of the case; the result of their finding would be a matter of law, arising out of the verdict. If it could exert any influence over their finding, it would probably be an improper one, by inducing them to find the issue improperly; because the consequences might not be very injurious. The charge moved for therefore, was highly improper, and should have been refused. But the charge given was wrong; it was held by this

Court in the case of Perkins & Elliott v. Mayfield, already referred to, that a finding in favor of the plaintiff, on such an issue as the one in this case, was a condemnation of the property absolutely, in discharge of the plaintiff's execution.

The judgment must therefore be reversed and the cause remanded for further proceedings.

HILL v. BISHOP.

1. When the defendant covenants to pay a stipulated rent for certain premises, and is let into possession, and continues to enjoy it until the end of his term, it is no defence to an action of covenant, that the plaintiff has omitted to make certain improvements and repairs to the leased premises. In such a contract the stipulations are independent.
2. When a plea is offered after the pleadings are made up, its acceptance or rejection is a matter of discretion with the Court, and will not be reviewed.
3. A continuance and its terms is also a matter of discretion, which will not be reviewed.
4. When the defendant, in presence of the plaintiff, and previous to entering into a contract for the rent of certain premises, insisted on repairs and improvements being made as an inducement to the contract, his estimate of the value of the improvements, &c, made in the presence of the plaintiff, cannot be given in evidence to the jury, for it leads to no conclusion that the value was admitted by the plaintiff.
5. In an action of covenant, the plaintiff's verdict for damages may be reduced by showing that the defendant has been injured, and to what extent, by the plaintiff's omission to perform his stipulations contained in the same contract.

Writ of error to the Circuit Court of Talladega.

Action of covenant by Bishop against Hill, on articles of agreement sealed by both, to this effect:

Bishop rented to Hill the house, lot and appurtenances thereto, known as the Indian Queen Hotel, from the 18th January, 1838, until the 1st day of January, 1839—Hill to keep the same as a Hotel. Bishop bound himself to have the Hotel

painted; to have the window sash repaired; to put glass therein; to build a meat house, and a corn crib, by the next spring Court; and another out-house as soon as he conveniently could. For, and in consideration of which, Hill promised to pay him one thousand dollars, as follows: five hundred dollars on the 1st January, 1839, and five hundred dollars on the 1st January, 1840; and bound himself to deliver the said Hotel and premises to the said Bishop on the 1st January, 1840, in good order; and further agreed, that the said Bishop should have the use of so much of the house, known as the Bell Tavern, as his family might require, for the space of three months, without charge.

The declaration sets out so much of the covenant as relates to the payment of rent; and avers that the defendant was let into possession of the leased premises, and held them for the whole term. The breach assigned is, the non-payment of the rent.

The defendant demurred to the declaration, after craving oyer of the articles. The demurrer was overruled; and the defendant then pleaded—1. Covenants not broken. 2. That the plaintiff did not perform his covenants. 3. Payment. 4. Set off. The first plea was demurred to, and the demurrer sustained. Issues were joined on the others.

Another plea was afterwards offered by the defendant, setting out the agreements, and alledging that the plaintiff did not within a reasonable time, have the Hotel painted; nor have the sashes repaired, and glass put therein; nor build the meat house, corn crib, and other out house; but wholly failed so to do: whereupon the said defendant prayed, that the said plaintiff might be barred of his action. This plea was rejected by the Court.

The defendant also moved to continue the trial until the next term; but the Court refused to do so, unless he would confess a judgment for a portion of the plaintiff's demand.

In the progress of the trial, evidence was given by the defendant, that the corn crib, meat house, &c., were not built by the plaintiff; and that he did not make the repairs he had covenanted to make on the Hotel. On the evidence, the Court was requested to charge the jury, that they should find in his

favor. This the Court refused. He then requested the Court to instruct the jury that, unless the plaintiff had shewed by proof what was the value of the use of the premises without these houses and repairs, he was not entitled to recover. This was also refused; and the jury was instructed, if they should be of opinion that the houses, &c., were not built as covenanted, they should deduct the fair value of such improvements as were not made.

A witness was also called by the defendant, and asked what estimate the defendant placed on the repairs, &c., &c., at the time of making the contract, and before the execution of it. This estimate was made in the presence of the plaintiff. This evidence was objected to, and the witness not allowed to answer.

Exceptions were taken to the several matters, and errors are now assigned on the whole record by the defendant, against whom a recovery was had in the Circuit Court.

COCHRAN for the plaintiff in error.

MOORE for the defendant.

GOLDTHWAITE, J.—1. Judges have often perplexed themselves and others, by endeavoring to ascertain determinate and arbitrary rules under which to class all covenants. After repeated failures in such efforts to settle rules, it seems now to be generally conceded, that the safest and best course is, to ascertain what was the intention of the parties from the instrument they have executed, and then to give it such a construction as will carry this intention into effect. [Kingston vs. Preston, 2 Doug. 689; Glassbrook vs. Woodrows, 8 Term. 371.]

The form of the covenant, or the manner in which the several stipulations to be performed by either party, are stated in the agreement, is of very little importance; because Courts must frequently construe covenants to be entirely independent, even in cases where a dependence is indicated by express words.

Thus, in Boone vs. Eyre, 1 Henry Black. 273, the plaintiff conveyed to the defendant the equity of redemption of a West India plantation, together with the stock of slaves on it, in con-

sideration of an annuity for life, and covenanted a good title to the plantation, and was lawfully possessed of the slaves; and the defendant covenanted he would pay the annuity, the plaintiff well and truly performing all and every thing therein contained, on his part to be performed. The breach assigned was, the non-payment of the annuity. The defendant pleaded that the plaintiff, at the time of making the deed, was not legally possessed of the slaves or the plantation, and so had not a good title to convey. To this, there was a general demurrer; and it was held, that as the covenants in relation to the slaves went only to a part of the consideration, and as the breach could be paid for in damages, the plea was not good; for, if it was allowed, any slave, not being the property of the defendant, would bar the action. It will be perceived, that the lands and slaves were conveyed; so the contract on the part of the plaintiff was executed.

So, in the present case, the contract of lease was executed, and it would seem to be absurd to conclude, that the right to receive the stipulated rent could be lost, by the omission of the plaintiff either to insert a pane of glass, or to erect the corn crib.

There is also, in this case, another feature which enables us to ascertain the intention of the parties with unerring certainty. The contract, in part, was executed by the plaintiff, and as to the other portion, the execution was postponed to a future day. It is impossible, therefore, that the stipulations of these parties were intended to be mutual and dependent. The defendant cannot be permitted to insist that he is relieved from his contract, by the failure of the plaintiff to perform a part of the matters covenanted by him. [Campbell vs. Jones, 6 Term. 670; Carpenter vs. Cresswell, 4 Bingham 409.]

This conclusion disposes of all the questions raised on the demurrer to the declaration; and would also, be sufficient to dispose of the rejected plea, if that also had been demurred to.

2. The plea was presented after the pleadings had been made up, and the application then to plead another, is always addressed to the discretion of the Court, and its decision is not subject to revision.

3. The same may be said of the refusal to continue the case ; but if this was subject to revision, we should hesitate for a reason to show that a party ought to be obliged to wait for one portion of his just demand, because another might be disputed.

4. The estimate, which the defendant placed, on the improvements and repairs, even if made in the presence of the plaintiff, was not proper to go before the jury as evidence, for it cannot be considered as an admission of their value ; and if it cannot be considered in this light, there is no pretence for its admission.

5. We can perceive no error of which the defendant is allowed to complain, in the instructions given to the jury. The amount to be paid as rent, was stipulated, and we have already shown that the omission of the plaintiff to perform what he had stipulated, does not discharge the defendant's liability.

The strict rule adopted in most Courts, would throw the defendant on his cross action ; but the case of *Green vs. Lenton*, 7 Porter 133, settles, that the damages in an action of covenant may be reduced, by showing that the defendant has sustained damages by the plaintiff's omission to perform stipulations contained in the same agreement. The rule adopted in that case, was, in substance, the one given in charge to the jury.

There is no error, and the judgment is affirmed.

PITFIELD ET AL. v. GAZZAM.

1. The complainant in a cause in Chancery, is not entitled to a decree *pro confesso*, until thirty days have elapsed after the service of *subpœna*.
2. In an ordinary case, the reversal of a decree does not affect the title of a purchaser acquired under it. *Quere*. Does not the same rule apply to a purchaser under a decree of foreclosure, where the bill is taken *pro confesso*, within less than thirty days after service of *subpœna*?

Writ of error to the Chancery Court, sitting at Mobile.

THIS was a bill for the foreclosure of the equity of redemption in, and the sale of, mortgaged premises. A *subpœna* was served on one of the defendants to the bill, on the 23rd March 1840, on the other, on the 30th of April; and the decree was rendered on the 22nd May, referring it to the Master, to report the amount due to the mortgagee. This report was made and confirmed on the 23rd of May, and the Master accordingly directed to sell the mortgage premises.

It is now assigned for error, that a decree was rendered within less than thirty days after service of the *subpœna*.

STEWART, for the plaintiff in error.

CAMPBELL, for the defendant.

COLLIER, C. J.—It is clear that under our statute, regulating the practice in Chancery, it is not allowable for a complainant to have his bill taken *pro confesso*, until thirty days have elapsed, after the service of *subpœna*. Aik. Dig. 287. The decree of the Chancellor is consequently erroneous.

It is also insisted for the plaintiffs in error, that not only the decree which ordered a sale of the mortgaged premises, but the sale itself, is also irregular, and should be vacated.

In an ordinary case, the reversal of a decree does not affect the title of a purchaser acquired under it. Wyman, et al. v. Campbell, et al., 6 Porter's Rep. 219. Whether the sale made in the present case, should be allowed to divest the mortgagor's

equity of redemption, is a question which we cannot understandingly adjudicate upon the record before us. It is one which appropriately pertains to the Court of Chancery, from a consideration of all the facts that may be there adduced.

We have only to direct that the decree be reversed and the cause remanded.

JACKSON, USE &C. v. STANLEY.

1. A non-resident, commencing a suit by attachment, need not state the fact of his non-residence in the affidavit. If such is the fact, and no sufficient bond or affidavit is made, it may be pleaded in abatement.
2. The bond in such a case need not show that the sureties reside within the State; if such is not the fact, the proceedings may be abated.
3. The plaintiff is not required to be a party to the bond, required to be given by a non-resident, suing out an attachment against a non-resident.
4. There is no difference between a void bond and a defective bond, given for the prosecution of an attachment, and in either case, it is the duty of the Court to permit the plaintiff to substitute a sufficient bond.

Error to Henry Circuit Court.

THIS action was commenced in the Court below, by the plaintiff in error, by attachment, for the use of W. H. Wilder. The affidavit is made by one Davis, who declares himself to be the agent of Jackson, and concludes by averring that "Stanley resides out of the State, and has not sufficient property within the State of his residence, within the knowledge or belief of deponent, whereupon to satisfy said debt, and that an attachment is not sued out," &c.

The bond is executed by Wilder as principal, with W. G. N. Davis, and Charles Mills, as his sureties. The names being thus signed,

W. H. WILDER, [Seal.]

By his Agent W. G. M. Davis.

W. G. M. DAVIS, [Seal.]

Agent of B. G. Jackson, who
sues for the use of W. H. Wilder.

CHARLES C. MILLS, [Seal.]

By his agent W. G. M. Davis,

Upon this affidavit and bond, a writ of attachment issued against the estate of Stanley, which was returned executed; and a declaration was afterwards filed in the usual form. The defendant in attachment appeared by his counsel, and moved to quash the attachment—

1. Because Davis had no authority to act as agent, without producing his power.

2. The fact of the non-residence of the plaintiff, should have been disclosed in the affidavit.

3. The bond is defective in the following particulars—it does not show at whose suit the attachment was sued out—the residence of the obligors in the bond do not appear, and the Court can know it from no other source than the bond itself—that Davis has no power to bind the obligors in the bond as their agent, without an authority under seal, which should appear—that the bond has been materially altered by interlineation, since it was executed, and is therefore void. And thereupon the counsel for the plaintiff offered to prove that both the plaintiff Jackson, and Wilder were non-residents; and that Mills, the security, was a resident citizen of this State; and moved for leave to amend the attachment and proceedings, so as to make them conform to the truth of the case; which motion the Court refused, and quashed the attachment. To which judgment of the Court, the plaintiff prosecutes this writ of error, and now assigns for error.

1st. That the Court erred in refusing to permit the proceedings to be amended.

2nd. The Court erred in quashing the attachment.

PECK & CLARKE, for plaintiff in error.

PHELAN, contra.

ORMOND, J.—The objections to this attachment are, that the affidavit is defective in not stating that the plaintiff is a non-resident; and that the bond is void. Great strictness was formerly required in this State in the proceeding by attachment, and causes were frequently disposed of on mere technical objections, To remedy which, the Legislature declared that the attachment law should not be rigidly and strictly construed. Aik. Dig. 42. The effect of this law must be to place suits, commenced by attachment, on a footing with all other suits commenced in the ordinary mode; and considered in this light, no reason is perceived why a party suing out an attachment, should be required to show in the affidavit, any thing more than the statute requires, to authorize an attachment to issue. The act authorizes a non-resident, equally with a resident citizen, to commence a suit by attachment against one residing out of the State, by making an affidavit, which is prescribed by the law, and giving a bond with surety living in the State; and there would appear to be no more reason in requiring the non-resident to state his residence in the affidavit, than to exact it from the resident citizen suing in the same mode. Under the old attachment law, which authorized only resident citizens to commence suits in this mode, it was never considered necessary, that the residence should appear in the affidavit; but it was sufficient, if that fact was shown in any part of the proceedings. See the case of *Peters & Stebbins v. Bower*, Minor's Rep. 69, in which it was held, that it would be sufficient, if the fact appeared by the indorsement of the justice of the peace.

The Circuit Court is a Court of general jurisdiction; the authority therefore to sue need not be shown, but must be questioned by plea in abatement—the foundation for the attachment having been laid, as in this case, by a proper affidavit, and sufficient bond.

The objections to the bond are, first, that it does not show at whose suit the attachment is sued out. This objection is incorrect in point of fact; the condition explicitly states, that the suit is commenced by Jackson for the use of Wilder. Second, that the residence of the obligors in the bond does not appear. We do not think it necessary that this fact should appear in

the bond. The statute requires, that surety residing within the State, should be given; and, for the reasons already given, the presumption must be, that such is the fact, as it is only on giving surety of this description, that the magistrate is authorized to issue the attachment. Should this not be the fact, the proceedings may be abated, and that whether the bond recited the fact, or, as in this case, was silent on the subject. Third, that Davis had no authority to bind the obligors in the bond, without an authority under seal, which should appear. It is true, that to bind them, by executing the bond in their names, he must have been legally empowered to do so; and it was the duty of the magistrate to have been satisfied that such was the fact, before he permitted the bond to be thus executed; but no reason is perceived why this should be a part of the bond. If the validity of the bond is questioned on that ground, he must doubtless show his authority to bind them; but his assertion of the fact, in the bond itself, or in any other part of the proceedings, would be no proof of the fact, and would therefore be a mere idle act. He does assume to act as agent of the parties, and that is, *prima facie*, sufficient to authorize the issuance of the attachment. This objection however will be further considered in another part of this case.

The last objection to the bond is, it has been materially altered by interlineations since it was made, and therefore, is void. To make this objection available, it should appear what changes were made in the bond, after its execution, and by whom—for, if the alterations were made by a stranger, they might not affect its validity—or, if made by the consent of the obligors, would be free from objection. How the facts were, or whether the changes were sufficient to put the party relying on the bond, to proof of the fact, how, and by whose authority such alterations were made, after the execution of the bond, does not appear from the record. But, conceding such to be the fact, it was the duty of the Court to allow the plaintiff in the attachment, to substitute a new bond. This point was expressly ruled thus, in the case of *Alford v. Johnson*, 9 Porter, 320. A distinction was attempted to be drawn in this case, between a defective bond, and a void bond. The distinction, however, does not appear to be well founded. If there be a bond in

point of fact, which is not such an one as the statute requires, it is void, for all the purposes of the attachment; and is within the rule laid down, in *Alford v. Johnson*.

The statute, which authorizes a non-resident to commence a suit by attachment, against a non-resident, does not require that the plaintiff should be a party to the bond, to be given for the prosecution of the suit. Its language is, "Provided, that such non-resident shall give good and sufficient security, residing within this State, to be approved by the Judge of the County Court, &c. for the amount, and with the like condition, as required in other cases." (*Aikin's Digest*, 40, s. 9.) The reference here, is to the third section of the same act, which requires the plaintiff, his agent, attorney, or factor, to give bond in double the amount claimed, payable to the defendant, with condition to prosecute the attachment to effect, and pay the plaintiff all such damages as he may sustain, &c. It would appear from this law, that there was no necessity that the plaintiff should be a party to the bond, when he is a non-resident. Such a requisition would frequently deprive him of the right to sue in this mode. All he is required to do is to *give good and sufficient security, residing within the State*; and the third section is referred to, for the amount and condition of the bond, thus to be given for the indemnity of the defendant.

Under this view of the case, it becomes entirely unimportant, whether Davis was empowered or not to sign the names of Wilder and Jackson. The addition of their names certainly could not vitiate the bond. It is signed by the agent Davis, and by Charles C. Mills, by his agent Davis, who we must presume is a resident citizen, and a sufficient surety, as the bond is approved by the proper officer.

There does not appear, therefore, on the face of the bond, to be any objection to it. And if any intrinsic objection not brought to the view of this Court, exists to the bond as already stated, it was the duty of the Court not to quash for that defect, unless the plaintiff refused to remove the objection, by the substitution of a perfect bond.

Let the judgment be reversed. and the cause remanded.

INGE ET ALS v. BOARDMAN.

1. When a bill is filed to foreclose a mortgage, the personal representative of the deceased mortgagor, is not a necessary party. Those only who are entitled to the equity of redemption, are necessary parties,
2. When several promissory notes are secured by mortgage on lands, and the mortgagor devises a portion, and sells the remainder of the mortgaged lands, and dies, the remedy on the mortgage is not barred, although the holder of the notes omits to present them for payment, to the personal representative of the deceased mortgagor, within eighteen months; and is, by such omission, barred of his remedy against such personal representative. And there is no distinction between the case of a mortgagee, in or out of possession of the mortgaged premises.
3. When the record, in a suit to foreclose a mortgage, shews that the notes, and a copy of the mortgage, were used in evidence at the hearing, it will be presumed, in the absence of exceptions, that the proper proof was made, and the objection comes too late in an appellate Court.
4. When lands which have been mortgaged, are devised to the widow of the mortgagor, and she has not dissented from the will, by which she is also entitled to other estates, she has no equitable claim to dower, against the mortgagee.

Writ of Error to the Court of Chancery for the fifth District of the Northern Division.

THE bill was filed the 29th September, 1838, and its object is to foreclose a mortgage executed in January, 1826, by Richard Inge, senior, to secure to Boardman the payment of nine promissory notes, due on the first of May of each year, from 1826 to 1834 inclusive. The bill alleges the execution of the notes and mortgage; that Inge in his life time sold a part of the mortgaged premises to one Hogan, who afterwards sold to Henry Potter, who is the tenant in possession; that Inge made his will devising the other portion of the mortgaged premises to his wife Mary, during the term of her life, with remainder to his six youngest children, Robert S., Elizabeth (who has intermarried with G. W. Crabb) Martha Ann, Montgomery, Eveline, and Emily, that the four last named are infants. The devisees, Crabb and Potter, are made defendants, and the prayer is for a foreclosure and sale, if payment is not made of the notes due in '28, '31 '32 and '33, which are alleged to remain unpaid.

A guardian *ad litem* was appointed for Martha Ann, Eveline and Emily, who answered, denying the allegations of the bill, and requiring strict proof.

Zebulon Montgomery, named in the bill as Montgomery Inge, was afterwards made a party by publication, it appearing that he was not an infant, and was a non-resident. And the bill as to him was taken as confessed.

The other defendants answered the bill, insisting that the demand was stale, and probably had been paid by Inge, senior, in his life time ; that letters testamentary on the will of the deceased were granted, on the 23d day of September, 1833, to George W. Crabb, one of the defendants ; that publication was duly made, requiring all persons having claims against the estate, to present them within the time allowed by law, or they would be barred ; that this claim was never presented within the period of eighteen months from the publication ; that the claim of right belongs to the Connecticut Assylum, for deaf and dumb persons ; and that a suit at law on the notes had been defeated by the executor.

The answer of Crabb insists, that the land sold to Potter, ought not to be subjected to the mortgage, until all the assets of the estate, both real and personal, have been exhausted ; and he demurs to the bill, because the personal representative of Inge is not made a party, and also because, on its face, the demand is barred by the statute of non-claim.

Mrs Inge also insists, that she was induced to accept the terms of the will, in lieu of dower, under the impression and belief that the lands were unincumbered. Potter admits that he is a purchaser under Inge, and submits to whatever decree the Court may render in the premises.

The evidence stated in the transcript, on the part of the complainants, consists of a copy of the mortgage, and the several notes ; but it is not shown how these were proved to be genuine, or why the copy of the mortgage, instead of the original, was offered.

The evidence, on the part of the defendants, consists of admissions of the complainants, that the demand was not presented within eighteen months after the publication by the executor ; that the personal estate was amply sufficient to satisfy the

demand; and that suit was commenced at law on the same notes, and decided in favor of the executor, on the interposition of the defence created by the non-claim.

No exception of any kind seems to have been taken in the Court of Chancery to the admission of the notes, and copy of the mortgage in evidence.

The Chancellor decreed a foreclosure and sale of the premises.

From this decree, the defendants prosecute a writ of error, and assign that the Chancellor erred—

1. In overruling the demurrer to the bill.
2. In admitting the copy of mortgage in evidence.
3. In decreeing a sale of the mortgaged lands.
4. In decreeing a sale without awarding dower to the widow.

COCHRAN, for the plaintiffs in error, insisted—

1. That the personal representative of Inge, was an indispensable party to the bill. [Wilkins v. Wilkins, 4 Porter, 245. Darrington v. Borland, 2 Porter, 22.

2. That the statute of non-claim extends as well to claims secured by mortgages as to other demands. The personal estate is released by the laches, and therefore the devisee, if damaged, has no redress. A mortgagee *out of possession*, has nothing but *a claim*. Sedgewick v. Hollenback, 7 John. 380; Runyon v. Mesereau, 11 John. 538. And when a claim is barred in one forum, it is so everywhere. Goodman v. Monks, 8 Porter, 84; Reedy v. Thompson, 4 S. & P. 52; Acliff v. Skrimshire, Salk. 573; Lacy v. Kinaston, 1 Ld. Ray 691; Strongford v. Green, 2 Mod. 228.

3. In admitting the notes and mortgage without evidence of their execution.

4. In decreeing the sale of mortgaged premises without awarding dower to the widow.

РЕСК, for the defendant in error, contended that the personal representative of the mortgagor, is a necessary party, only when the complainant seeks to make up an anticipated deficiency out of the personal estate. [1 Story Eq. P. 163, 181.

The statute of non-claim was never intended to bear on such a demand as this, as the mortgagor has created a specific lien

on his estate; therefore the creditor is not *bound* to resort to the general fund, though he may do so if he chooses.

No exception was taken at the hearing, to the insufficiency of the proof, either as to the execution of the mortgage or the notes; all writings exhibited, may be proved at the hearing, and this probably was done in this case. At all events it would be extremely unjust, to defeat the complainant on a technical objection, now heard of for the first time.

As to the objection, that dower was not awarded to the widow, it is only necessary to say, that she had no claim whatever, she never having dissented from the provisions of the will in her favor.

GOLDTHWAITE, J.—The case of *Wilkins v. Wilkins*, 4 Porter, 245, has been cited as a decision of this Court, of the necessity that the personal representative of a deceased mortgagor, should be a party defendant to the bill for foreclosure. It is true, that the opinion admits that such is the law; but the case did not turn on this question, as the personal representative was in fact a party, though not regularly subpoenaed. The question presented in this case, was neither examined or decided, in that which has been cited. We therefore consider it as an open question.

In the present case it is not pretended, that the personal representative of the deceased mortgagor, as such, is before the Court; and therefore we are called on to determine, whether the case could properly proceed without him.

This is certainly a question of much difficulty on authority, for it is the general rule whenever a bill is filed for the purpose of enforcing a debt against the real estate, which debt is properly chargeable, in the first instance on the personal assets, to make the personal representatives of the deceased parties defendants, as well as the heirs or devisees. As in the cases where the real as well as the personal estate is charged with the payment of debts. [*Harris v. Ingledew*, 3 P. Wms. 92; *Berry v. Arkam*, 2 Vern. 26.] So likewise when a suit in equity is brought against the heir, for the performance of a covenant by his ancestor. [*Knight v. Knight*, 3 P. Wms. 333.]

The reason of the rule, as stated in the case just cited, is, that a court of equity delights to do complete justice, and not by halves: as first, to decree the heir to perform the covenant, and then to put him upon another bill, against the executor, to reimburse himself out of the personal assets, which, for aught appearing to the contrary, may be more than sufficient; and, where the executor and heir are both before the Court, complete justice may be done, by decreeing the executor to perform the covenant, so far as the personal assets will extend; the rest to be made good by the heir, out of the real assets. This reasoning certainly applies equally to the case of a creditor, who has taken a mortgage, as a security for a debt, and was so decided, in *Christopher v. Spark*, 2 *Jacob & Walker*, 229.

On the other hand, it is said, by Mr. Cox, in his note on the case of *Knight v. Knight*, 3 P. Wms. 333, to have been held, in the case of *Dunscombe v. Hansley*, that there is no necessity for making the executor of a mortgagor a party; because the bill being only to foreclose an equity, the plaintiff need only make him who has the equity, a party. Neither is the mortgagee any way bound to intermeddle with the personal estate, or run into the account of it; and, if the heir would have the benefit of any payment made by the mortgagor, or his executor, he must prove it.

It is difficult, perhaps impossible, to reconcile these decisions; and the facts of the present case, as exhibited at the hearing, are very conclusive to shew, that the true rule is stated by Mr. Cox, in his note.

What is the necessity of always making the executor a party, if there are some cases, in which the debt may remain, and yet the executor may not be bound, or even authorized to pay it out of the personal assets? The case of a debt, barred by the statute of limitations, would prevent the former; and that of a debt, barred by non-claim, may possibly prevent the latter.

It is evident, that the executor of Inge could not be decreed to pay this debt from the personal assets, because he had already been discharged by the judgment, in the suit at law, in consequence of the non-claim. To first dismiss the bill, as bad on demurrer, because the personal representative was omitted as

a party ; and afterwards, when the same bill is amended by inserting his name, to permit him to shew that he has nothing to do with the suit, by shewing that he is not liable, or not authorized, to pay the debt out of the personal assets, to say the least of it, would be a most singular conclusion.

We come then, to the conclusion that, as there are cases in which no decree can be had against the personal representative of the mortgagor, it is unnecessary in this.

2. The other main position, assumed by the plaintiff's counsel is, that, as the remedy against the executor was barred by the statute of non-claim, the debt was extinguished, and the mortgage became extinct with it.

This question was very fully considered, in the case of *Duval's heirs v. McLoskey*, and a majority of the Court then held, that, although the remedy as against the executor, might be barred, that on the mortgage remained in full force. I was incompetent to preside in the decision of that case; but I take this occasion to say, that it has my concurrence on this point.

We do not conceive that it makes any difference in the law, whether the mortgagee is, or is not, in possession of the mortgaged premises, when his remedy becomes barred, as against the personal representative.

3. The notes, and the copy of the mortgage, are stated as a part of the evidence in the cause. They were papers appertaining to the suit, and might have been proved *viva voce*, at the hearing: (*Levert v. Redwood*, 9 Porter, 79.) No exception seems to have been taken at the hearing, and it is now too late to insist, that the writings were not sufficiently proved.

4. The exception that dower is not allowed by the decree to Mrs. Inge, may be answered by observing, that she is not entitled to it. Whatever may have been the reasons which induced her acceptance of the provisions of the will in lieu of dower, she has no equitable claim against the mortgagor.

We cannot arrive at the conclusion, that there is error in any of the matters to which our attention is called, by the assignment of errors, and the decree is affirmed.

DOUGHERTY v. COLQUITT, USE, &C.

1. *Semble*—That where a judgment recites, "the plaintiff came by his attorney, and the defendants say nothing in bar or preclusion of this suit," &c., it will be presumed the pleas found in the record were waived.
2. Where a defendant pleads an affirmative plea, the *onus* of proving which lies upon himself, the most regular course would be to reply, or demur to it; yet, if the defendant does not appear to sustain his plea, and a judgment by default is rendered in favor of the plaintiff, it will not be reversed on error; for the irregularity was one from which no injury resulted.

THE defendant in error caused to be issued an attachment returnable into the Circuit Court of Chambers, against the estate of the plaintiff, upon an affidavit of his non-residence.

The plaintiff in error pleaded the pendency of another action for the same cause. And a judgment was rendered in favor of the plaintiff by default for the amount of the note declared on, with interest, without noticing the plea. To revise the judgment of the Circuit Court, the defendant below has prosecuted a writ of error to this Court; and now assigns for error, the rendition of a judgment by default, without disposing of the plea.

GOLDTHWAITE and ROBERTSON for the plaintiff in error.
GUNN for the defendant.

COLLIER, C. J.—The earlier decisions of this Court considered an exception, such as that now taken, as fatal to the judgment. But the law here, as well as in other Courts, has, in accordance with the spirit of the times, been greatly relaxed, so that objections which are merely technical, and cannot advance the ends of justice, receive comparatively little favor. In *McCollom & Capel vs. Hogan, ex'r., &c.*, 1 Ala. Rep. N. S. 515, there were several pleas found in the record; yet the Circuit Court, in its judgment recites that, "the plaintiff came by his attorney, and the defendants say nothing in bar or preclusion of this suit," &c. This Court held, in the absence of any thing in the record showing that the pleas were insisted on,

that it would be intended that they were waived; inasmuch as the defendants were in Court, and did not insist on them.

In the case before us, the judgment shows that the defendant was not in Court, but being called, he came not, but made default. The plea interposed was an affirmative one, and the *onus* of sustaining it lay upon the party pleading; and though the correct course of procedure was, either to demur or plead, that an issue might be presented to the Court or jury, yet the omission to notice the plea, cannot be regarded as fatal to error. If the plea had been demurred to, and adjudged insufficient, or if an issue of fact had been made up and presented to the jury, the plaintiff in error would not occupy a more favorable position than he now does. Upon presenting the case to the jury, the plaintiff below would have entitled himself to judgment merely by the production of the note sued on; unless the defendant had proved the allegations of his plea. This he could not have done, as we are informed that he was not in Court. The plaintiff in error has therefore sustained no injury by the irregularity of the proceeding in the Circuit Court: he is not denied the privilege of insisting on any error which would have availed him, had the judgment been rendered upon a verdict against him.

The ground upon which we place this opinion, being entirely satisfactory to ourselves, we have not thought it necessary to examine the plea to ascertain if it was not demurrable, and the omission to notice it, consequently, not prejudicial to the plaintiff in error.

The judgment is affirmed.

HUSSEY & WIFE v. ELROD & WIFE.

1. In an action brought to recover damages for an assault and battery, by the wife of the defendant, on the wife of the plaintiff, the admissions of the wife of the former cannot be given in evidence to charge her husband.

Error to Talladega Circuit Court.

THIS was an action of trespass, brought by the plaintiffs against the defendants, to recover damages for an assault and battery, by the wife of the defendant, on the wife of the plaintiff. The defendant obtained a verdict and judgments.

By a bill of exceptions in the record, it appears that the plaintiff offered to prove the assault and battery by the confessions or admissions of the wife of the defendant, which the Court rejected, and to which the plaintiff excepted.

CHILTON for the plaintiff in error.

WM. B. MARTIN contra.

ORMOND, J.—The general rule of law is, that husband and wife cannot be witnesses, either for or against each other, either in civil or criminal proceedings. The rule is founded on the identity of their interest, and because it is necessary to guard the security and confidence of private life, which would be constantly invaded, if the married pair, in this respect, stood towards each other, as they do towards the rest of the world. It would seem to follow that, as the wife cannot give evidence so neither can she charge her husband by an admission; for that would let in all the mischief which the rule is designed to prevent. It was so held in the case of *Denn vs. White and wife*, 7 Term. Rep. 112, and *Hawkins vs. Halton and wife*, 2 Nott & McCord 374. The admission of a wife, during coverture, of a debt due before marriage, is not admissible as evidence against the husband. [1 Halst. Rep. 366.]

There is no error in the judgment of the Court below, and it is therefore affirmed.

THE STATE v. MAHAN & HENRY.

1. Betting on the result of an election, *after* the election has been consummated, is not within the statute of 1830. (Aikin's Digest 209, S. 49.)
2. When an offence is created by statute, in general, it is sufficient for the indictment to charge the offence in the terms used in the statute; but if superfluous allegations are added, and these show a case not within the statute, the indictment is bad on demurer.

Question referred by the Circuit Court of Bibb County, as novel and difficult.

INDICTMENT for betting on an election; the charge as stated is, that the defendant "*on the 10th day of October, 1839*, did bet promissory notes upon the result of an election in this State, to wit: upon the election for representative in the Congress of the United State from the Congressional district including the County of Bibb, to wit: the third Congressional district of the State of Alabama—*held on the 1st Monday of August, 1839.*" The defendant demurred to the indictment; the demurrer was overruled, but the question of law reserved for the decision of the Supreme Court.

THE ATTORNEY-GENERAL, for the State.

PECK, for the defendants.

GOLDTHWAITE, J.—1. This indictment is supposed to be authorised by the act of 1830, which is in these terms, "any person or persons, who shall make any bet, or wager of money, or any other valuable thing, upon any election or elections in this State, shall be guilty of a misdemeanor." The practice of wagering with respect to an election, is one very well calculated to affect the purity of the elective franchise, and is the one which the statute was intended to suppress; but there is a wide distinction between betting on the result of an election, which has been consummated, and one which is in progress. In the former, however much the feelings of indi-

viduals may be or have been excited, their action cannot be influenced either directly or indirectly by any wager, which they may make; the election is determined, although it may not be known who is elected.

In the latter, not only the feelings, but also most frequently, the action of those who bet are strongly influenced by the wager. In our opinion, the statute applies only to those who bet on the result of an election, which is not consummated.

2. It is insisted, however, that under the allegations of this indictment the State might properly, and probably did, prove a betting by the defendants, previous to the time, when the election was held.

Whatever may have been the proof at the trial, the question now presented, relates solely to the sufficiency of the indictment; the defendants submit, that they are not amenable to punishment, if all the allegations of the charge are admitted to be true. In general, it is sufficient for the indictment to charge the offence in the terms of the statute, but if superfluous allegations are added, and these show a case not within the statute, the several allegations then become repugnant to each other, and the indictment is bad on demurrer. [King v. Stephens et al., 5 East 244.]

This indictment is not, however, repugnant in the ordinary sense of that term; for all the allegations are consistent with each other, though repugnant to the idea, that the defendants are guilty under the statute. The charge is, that they, on the 10th of October, 1839, made a wager upon the result of an election, which was consummate on the 1st Monday of August before.

This, as we have already shown, is not within the statute, the demurrer should therefore, have been sustained.

Let the judgment be reversed and here rendered for the defendants.

HENDERSON v. HOWARD, COPELAND & CO.

1. *Semble*—That where a note is payable on demand, a personal demand of the maker is not necessary to entitle the holder to sue.
2. Where the declaration sets out a legal liability, and avers a subsequent promise to pay "on request," such an averment will be regarded as a mere consequence of the cause of action disclosed, and the declaration will be good, though it is not alleged that a *request* was made.
3. Where an action is founded upon a bill of exchange, the bill and the protest are not necessary parts of the record, but can only become such by bill of exceptions.
4. In an action against the drawer or an endorser of a bill of exchange, a final judgment may be rendered by default against the defendant.

THE defendants in error declared against the plaintiff in the County Court of Talladega, as the second endorser of a bill of exchange.

The declaration describes a bill of exchange drawn by John G. Eve, at Talladega, on the 7th January, 1839, for the sum of two thousand six hundred and fifty dollars, on Messrs. O'Neil, Michaux & Thomas, at Mobile, and payable twelve months after date. And alleges that the same was presented to the drawers in the city of Mobile, on the 28th January, 1839, for acceptance; that acceptance was refused; and the bill then and there duly protested for non-acceptance. The declaration then avers, that the defendant below had due notice of the protest for non-acceptance, and promised to pay the plaintiffs the bill on request; and then concludes with an averment of non-payment to their damage, &c.

The judgment recites, that the bill and protest for non-payment, were produced to the Court, and is rendered by default for the amount of the bill, with ten *per cent.* damages and costs.

A writ of error has been prosecuted by the defendant below, to revise the judgment of the County Court; and it is here assigned for error—1. The declaration avers a promise to pay "on request," but alleges no subsequent request. 2. The record does not set out the bill of exchange, or a protest for non-

acceptance, or non-payment. 3. The judgment was rendered by default, without the intervention of a jury, for the amount of the bill and *damages*.

CHILTON & MOORE for the plaintiff in error.

WM. B. MARTIN for the defendant.

COLLIER, C. J.—1. The objection to the declaration is not well taken. Where a note is payable on demand, to entitle the holder to an action, no personal demand of the maker is necessary, but the institution of the suit is perfectly regular without it. But in the present case, a right of action accrued immediately upon the protest of the bill for non-acceptance; and the averment of a subsequent promise to pay “on request,” is an inference from the legal liability of the defendant, and cannot, though no request is made, prejudice the right of recovery. This averment, in another point of view, is entirely harmless, for it may be stricken out, and the declaration would be substantially good.

2. In respect to the second assignment, it is enough to say, that the bill and protest need not appear of record, in order to sustain the judgment; and could only have been placed there by bill of exceptions.

3. In *Malone & Co. vs. Hathaway*, 3 Stewart’s Rep. 29, it was held, that in an action against the endorser of a promissory note, under the statute of 1812, which imposed upon the holder the necessity of proving a demand and notice, judgment by default final might be rendered, without the intervention of a jury. And in *Randolph vs. Parish*, 9 Porter 76, it was decided, that where the drawer of a bill of exchange suffers judgment by default, there is no necessity for submitting the case to a jury to assess damages. The default admits that the steps necessary to fix his liability had all been taken, and that he was chargeable for the amount of the bill and damages recoverable upon it. These cases are decisive of the last error assigned; and the consequence is, that the judgment must be affirmed.

SNOW & CO. v. RAY.

1. No objection can be taken to a warrant, issued by a justice of the peace, in the firm name of the plaintiffs; and, on appeal, the names may be recited at length in the statement or declaration.

Error to Tuscaloosa County Court.

This suit was commenced before a justice of the peace, and carried by appeal to the County Court of Tuscaloosa county; Charles Snow & Co. were the plaintiffs before the justice.

In the County Court, the plaintiffs filed a statement, setting forth the persons composing the firm of Charles Snow & Co. To this the defendant pleaded in abatement, that the promise was made to the persons composing the mercantile firm, and not with Charles Snow individually, as alledged in the warrant. To this plea there was a demurrer, which does not appear to have been disposed of. The record also contains a demurrer to the statement, for a variance between the plaintiff in the writ, and statement filed as a declaration, which the Court sustained, and rendered a judgment for the defendants, from which the plaintiffs prosecute this writ of error.

PECK, for plaintiff in error.

MOODY, contra.

ORMOND, J.—Great indulgencies have always been shown by this Court, to the proceedings before a justice of the peace. Substance is all that is required—form is entirely disregarded. The designation of the firm name in the warrant, conveyed to the defendant all the information it was necessary he should have, to enable him to make his defence. In the County Court, the proceedings assume more regularity, and the names of the parties composing the firm are set out at length. This was all that was necessary, and no exception should have been allowed for the supposed defect in the warrant. This point was thus ruled in the case of *Condrey v. Henly & Murphy*, 4 Stew. & Por. 10. No notice has been taken of the plea in abatement, because the same question arises on the demurrer to the declaration. Let the judgment be reversed, and the cause remanded.

LIGHTFOOT ET ALS. v THE BRANCH BANK AT DECATUR.

1. In a summary proceeding at the suit of a Bank, the Court will not, in order to reverse a judgment, look to the notice and certificate found in the transcript; but if they are recited in the judgment entry, or are brought to the view of the Court by bill of exceptions, it will then be permissible to point out such defects as are shown by the judgment or bill.
2. Where a note was made for the payment of a debt due a Bank, in one, two and three years, under the provisions of the *second section* of the act of the thirtieth of June, 1837, it does not become due *in toto*, upon a failure to pay the first instalment.

THIS was a proceeding in the County Court of Morgan, at the suit of the Branch Bank at Decatur, by notice under its charter, to recover a debt of the defendants below. A judgment was rendered by that Court, at a term holden on the third Monday in February, 1839, as follows :

“ The Branch of the Bank of the State of Alabama at Decatur.

v.

Goodrich Lightfoot, Henry W. Hodges, Wm. P. Borum.

Comes M. W. Lindsay, attorney for said Branch Bank, and produced the note of the defendants, dated Lawrence County, sixth September, eighteen hundred and thirty-seven, in which Goodrich Lightfoot as principal, and H. W. Hodges and Wm. P. Borum, as securities, jointly and severally promise to pay to the President and Directors of the Branch of the Bank of the State of Alabama at Decatur, two thousand dollars, in three annual instalments, on the first of May eighteen and thirty-eight, nine and forty, with interest at the rate of eight per cent. from date, in accordance with the provisions of the second section of an act, passed at the called session of eighteen hundred and thirty-seven, entitled an act to extend the time of indebtedness, &c.; and also produced the certificate of H. Green, the President of said Branch Bank, setting forth, that said debt is wholly due and unpaid, and that it is really and *bona fide*, the property of said Branch Bank ; and moved the Court for judg-

ment against said defendants, for said debt and interest thereon from the sixth day of September, eighteen hundred and thirty-seven, together with costs, &c. ; and it appearing to the satisfaction of the Court, that the defendants severally had notice of this motion, thirty days previous to the making thereof, given by the President of said Branch Bank, under the seal of the same ; and the defendants being called, came not, &c. It is therefore, considered by the Court, that said Branch Bank recover of the defendants, said sum of two thousand dollars debt, and two hundred and thirty-three and thirty-three-hundredths dollars damages, by way of interest, for the detention thereof ; besides the costs of this motion. And the plaintiff's attorney comes into Court and enters a *remittitur*, for the sum of three hundred and forty dollars and fifty-four cents in part of this judgment, being an amount with interest paid since the commencement of this action."

To revise this judgment, a writ of error has been prosecuted to this Court.

PETERS, for the plaintiff in error,

No counsel appeared for the defendant.

COLLIER, C. J.—Several questions are attempted to be raised by the plaintiffs upon the notice, the initiatory process in the cause, and the certificate of the President of the Bank as to its property in the note ; but it has been repeatedly held that, where these are merely referred to in the judgment, they will not be looked to in order to reversal, *unless from their recital there*, they appear to have been irregular, and furnish no warrant for the action of the Court in favor of the Bank. [Bates v. The Planters' and Merchants' Bank of Mobile, 8 Porter's Reports, 96 ; Curry v. The Bank of Mobile, 8 Porter's Reports, 360.] If, however, the judgment entry, or a bill of exceptions show the notice or certificate to be insufficient, the judgment in favor of the Bank must be reversed. [Roberts et al. v. The State Bank, 9 Porter's Rep. 312 ; Sale v. The Branch Bank at Decatur, 1 Ala. Rep. N. S. 425.]

In the case before us, the judgment was rendered by default, consequently no exception was taken to the notice and certifi-

cate ; and their recital in the judgment entry shows them to have been conformable to law.

The only assignments of error then, we can notice, are those which relate to the regularity of the judgment. In considering these, the material inquiry is, whether a note made for the payment of a debt due a Bank, in one, two and three years, under the provisions of the second section of the act of the 30th June, 1837, becomes due *in toto*, upon a failure to pay the first instalment? That section provides that, all debts then due the State Bank or its Branches, or which might be running to maturity, should be divided into three annual instalments; as follows : one of twenty five per cent., to become payable during the months of March, April, May, or June, 1838 ; one of thirty-seven and a half per cent., to become payable during the months of March, April, May, or June, 1839 ; and one of thirty-seven and a half per cent., to become payable during the months of March, April, May, or June, 1840—the interest to be calculated at eight per cent. on the whole debt, up to the time when each instalment shall become due.

The act further provides, that the Governor, &c., shall issue five millions of State bonds, an equal amount of which; shall be deposited with the State Bank and each of its Branches, to be sold by them in aid of their respective capitals.

The twenty-first section of the act enacts, that the amount issued to the State Bank and its Branches, in State bonds, shall be lent to individuals not indebted to the Banks, in sums not exceeding two thousand dollars to any one, at an interest of seven per cent.—the persons applying for a loan, making notes payable in one, two and three years, with at least two good and sufficient securities, &c.

The twenty-sixth section enacts, that, “if any person, who shall borrow any sum or sums, under this act, shall fail to make payment of any instalment thereon, when it shall become due, the whole of the sum or sums so borrowed, or the entire balance remaining unpaid, shall become due; and the President of the proper Bank shall, at once proceed to collect the same.”

The twenty-seventh section gives a summary remedy to the Bank against their debtors, “as in other cases under the charter of said Banks.”

Under the influence of the twenty-sixth section, it has been decided that, if any person who borrowed money of the State Bank, or either of its Branches, under the provisions of the act of the 30th of June, 1837, fails to pay any instalment as it falls due, so much of the sum borrowed as remains unpaid, becomes due *instantly*, and the President of the proper Bank should proceed to collect the same. [Sale et al. v. The Branch Bank at Decatur, 1 Ala Rep. N. S. 425.]

But the twenty-sixth section, can by no rule of interpretation, be construed to embrace the case of an extended debt under the provisions of the second section; in such a case, the remedy of the Bank and the liability of the debtor must be determined by a reference to the contract between the parties. Taking this principle as our guide, and it is clear that the judgment of the County Court cannot be sustained. The plaintiffs in error, by their note, promised to pay to the Branch Bank at Decatur, two thousand dollars, in instalments, on the first day of May, in 1838, '39, '40; these instalments to be regulated in amount by the second section of the act cited. The contract was absolute; and there being no statute giving to it an effect, other than its terms import, the plaintiffs in error were not bound to pay, on a day in advance of that which was agreed on. The recovery against them should have been for the amount of the instalment due at the time of the service of notice, with interest; but instead of being for that sum, a judgment was rendered for the aggregate amount of all the instalments. The judgment must consequently be reversed; and would be here rendered, did it not appear that a payment was made to the Bank after the issuance of the notice. The precise time of this payment is not shown, so that interest cannot be calculated with exactness, and lest injustice be done to one of the parties by attempting it, we deem it safer to remand the cause.

It is unnecessary to consider, whether the judgment is objectionable for an omission to show by the proper recitals, that the proceedings were in conformity to the charter of the Bank; as the form of a judgment furnished in the case of Clements et al. v. The Branch Bank at Montgomery, 1 Ala. Rep. N. S. 50, if observed will prevent errors in that respect in future.

HAZARD, ADMINISTRATOR, v. FRANKLIN, GARNISHEE.

1. A garnishment may be levied on effects in the hands of a trustee of a deed, and if the deed is void in law, the money or effects will be subjected to the payment of the debt.
2. A garnishment relates to the present time, and money or effects acquired afterwards, cannot be subjected to the payment of the debt.
3. A trustee will be protected so far as he has *bona fide* disposed of the trust property under the deed, before service of the garnishment, and may retain for a debt due himself.
4. A joinder in issue upon the truth of the answer of a garnishee, is a waiver of any previous irregularity.

Error to the Circuit Court of Mobile.

THIS was a suit, commenced by attachment, by John B. Hazard, against one Daniel Stowe, in which the defendant in error was summoned as garnishee. On the 5th April, 1838, the garnishee appeared and made his answer in writing; in which he stated that he was the trustee in a deed of trust, executed by Stowe for the benefit of his creditors; that he had received property and money to a considerable amount, which he had disposed of as directed by the deed; and then had in his hands eight hundred and fifty dollars. He also stated, that a bill in Chancery had been filed, by which he was enjoined from paying any thing on account of the deed.

The cause remained on the docket without any step to obtain judgment against the garnishee, during which time there were some discontinuances, until the Fall Term, 1835, when the plaintiff's death was suggested, and a notice directed to issue to the garnishee, to show cause why judgment should not be entered against him on his answer. The cause was continued until the Fall Term, 1838, when a judgment was entered against the defendant on his answer, for eight hundred and fifty dollars; which judgment, on his motion, was set aside, and leave given to file an additional answer. The defendant having filed his additional answer at the next Term of the Court, denying any indebtedness, the plaintiff made affidavit, as re-

quired by the statute, denying the answer; whereupon an issue was formed to try the truth of the answer, and the jury having found for the defendant, he was discharged by the Court.

From a bill of exceptions found in the record, it appears an attempt was made to charge the garnishee, because, at the time of the summons of garnishment, and since, he had assets in his hands as trustee. The Court charged the jury, that the only issue to be tried on the controverted answer of the garnishee, was whether he was indebted to the defendant in attachment, due, or to come due, or had effects of the defendant in his hands; and that no question as to the validity of the assignment, could be tried in this proceeding. That if the jury believed the garnishee held the assets as trustee merely, under the deed, such fact would not authorise a judgment against the garnishee.

The plaintiff now assigns for error—

1. The ordering a new notice to the defendant.
2. Because judgment was not then rendered against the garnishee.
3. Setting aside judgment against garnishee.
4. Giving leave to file additional answer.
5. In charging the jury, as set out in the bill of exceptions.

ADAMS, for plaintiff in error, cited 2d Roote's Rep. 528.

STEWART, contra, 11th Wendell, 187.

ORMOND, J.—The counsel for the defendant in error maintains that the deed of trust, under which the property sought to be reached by this garnishment, was held by the garnishee, cannot be impeached collaterally, and can only be declared void in a direct proceeding, having that for its object. It is the practice of every day, to try the validity of a deed by levying an execution on the property conveyed by it; and we can perceive no reason why the same object should not be accomplished by a garnishment. But the precise point has been determined by this Court in the case of *Richards vs. Hazard*, 1 Stew. & Por. 189, in which the question arose on the same deed now relied on.

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Hazard sued out an attachment against Stowe, and caused it to be levied on effects in the hands of Richards; who answered and stated, that he had received notice that the property in his hands had been conveyed by a deed of trust by Stowe to Franklin. The Circuit Court gave judgment against the garnishee, declaring the deed void, because it did not provide for the payment of all the creditors, and contained a resulting trust to the grantor. This Court affirmed the judgment.

In this case, the deed is set out in the first answer of the garnishee, and as it is void in law for matter appearing on its face, it could afford no protection to the garnishee for the effects in his hands at the time of the garnishment. The Court therefore erred in instructing the jury, that "no question as to the validity of the assignment, could be tried in this proceeding; and that, if the garnishee held the assets as a trustee merely under the deed, such fact would not authorise a judgment against him."

So far as the trustee had *bona fide* disposed of the assets under the deed, previous to the service of the garnishment, he would doubtless be protected; so also, would he be permitted to retain for a debt due himself; but beyond these, the deed would not protect the effects of Stowe, in his hands, against the claims of his creditors.

The assignments of error bring to our notice the proceedings in the cause anterior to the issue joined between the parties, which we decline the examination of; because we think the joinder in issue a waiver of any previous irregularity, if any existed; but, as the cause must be remanded, it is proper to say, that it was entirely within the discretion of the Court to permit an additional or amended answer to be filed, to receive such weight as it is entitled to from the Court or jury, when called on to pass upon it.

From the evidence offered, and the instructions asked for in the Court below, it appears to have been supposed that the garnishee could be subjected on account of assets, which had come to his hands since the service of garnishment. The garnishment relates to the time of its service, and money or effects acquired afterwards, cannot be subjected. So in this case, if the notes recited in the first answer, were afterwards collected

by the garnishee, no judgment could be rendered for such amount on this garnishment, nor could the notes themselves being mere *choses* in action, be condemned. See the Branch Bank at Mobile vs. Poe, 1 Ala. Rep. N. S. 396, where this point was thus ruled.

We have not thought proper to enquire, whether the pendency of a suit in Chancery, as recited in the first answer of the garnishee, to subject the trust property to the payment of other debts, should exert any influence over this cause; because no question relating thereto, was raised in this Court, or, so far as we are informed by the record, in the Court below.

For the error of the Court below, in its charge to the jury, the judgment must be reversed, and the cause remanded.

ROEBUCK v. DUPREY.

1. The Supreme Court will, on motion of the plaintiff, at the first term, award a *scire facias* to hear errors, although a citation has not previously issued; but if such a motion be not submitted previous to the second term, nor an appearance entered, then on motion of the defendant, the cause will be dismissed for want of a citation.
2. If the plaintiff in error fails to file a transcript at the term to which the writ is returnable, he may sue out a second writ of error any time before the affirmance of judgment on certificate, and a motion to affirm for a failure to prosecute the first writ, will not be entertained after the case is brought up by the second.

In this case, a writ of error from the Circuit Court of Jefferson, returnable to the present term, with a transcript of the record attached, was filed. The plaintiff in error suggested to the Court, that it did not appear that a citation had been served on the defendant, or that one had ever issued; and thereupon moved, that a *scire facias* to hear errors be issued from this Court. The counsel for the defendant, declining to enter an appearance, moved the Court to dismiss the writ of error, and affirm the judgment; upon the production of a certificate,

showing that a writ to revise the proceedings of the Circuit Court in this case had been sued to the last term, but not prosecuted.

COCHRAN, for the plaintiff.

PECK, contra.

COLLIER, C. J.—According to the earlier decisions of this Court, where no citation accompanied the writ of error, and it was not shewn that one had issued, it appears to have been the practice, to dismiss the writ of error, on motion of the defendant. Such a practice in our opinion, is not promotive of justice and should not be adhered to. The defendant cannot be prejudiced, by the failure to issue a citation upon suing out the writ of error, since he must be in Court, either by himself or counsel, before he can move to dismiss the cause; and then, if he desires, may enter an appearance, and obtain every advantage which the service of a citation regularly issued could possibly give him. The only effect of a dismissal would be to burthen the plaintiff with the costs of this Court, while he might immediately sue out a second writ of error.

The practice to which we shall conform is this, on motion of the plaintiff at the first term, award a *scire facias* to hear errors; but if such a motion be not submitted previous to the second term, nor any appearance entered, then, on motion of the defendant, the cause will be dismissed for want of a citation. This we think will be a sufficient infliction for the plaintiff's neglect.

In the case of the United States v. Haden & Everett, 5 Porter's Rep. 533, it was held that if the plaintiff in error fails, from any cause, to file the transcript at the term to which the suit is returnable, a second writ may be sued out any time before the affirmance of the judgment on certificate. And the neglect or omission of a defendant in error, to move to affirm the judgment on certificate, where the transcript was not filed at the first or any subsequent term, precludes his right to an affirmance, after the case has been brought up by a second writ of error. This case is decisive to shew that the defendant's motion for an affirmance must be denied. But the plaintiff's motion for a *scire facias* is granted.

BLOCKER, ADM'R. v BURNESS.

1. Possession of personal property remaining with the vendor after an absolute sale, is not *fraud per se*, but a badge of fraud merely, casting on the vendee the necessity of showing that the sale is *bona fide*, and was not made with the intent to delay, hinder, or defraud creditors.
2. A witness is competent who believes in the existence of a God, and that he will punish falsehood and perjury in this world; although he does not believe in *future* rewards and punishments.

Error to the Circuit Court of Lawrence County.

THIS was a trial of the right of property, in which the plaintiff in error was the plaintiff in execution, and the defendant in error the claimant of the property, in which the claimant had judgment.

It appears from a bill of exceptions taken in the cause, that the claimant relied on a conveyance, made to him by the defendant in execution, of the property levied on, which was absolute in its terms, and proved that a fair consideration was paid by him for the property. The possession of the property remained with the defendant in execution.

The plaintiff's counsel moved the Court to instruct the jury that, if they believed from the evidence, that the possession of said property remained with the defendant in the execution, up to the time of the levy, and still continued with him, said conveyance was fraudulent *per se*, and void as against the plaintiff in execution; which the Court refused, and charged the jury that, if they believed from the evidence, that the transaction was upon fair and sufficient consideration, was *bona fide*, and not intended to hinder or delay creditors, they must find the issue in favor of the defendant.

The defendant having introduced a witness, his competency was objected to, on the ground that he did not believe in rewards and punishments after death—his belief was proven to be, that the Almighty punished mankind in this life for their misdeeds; but that there was no punishment, but universal and

everlasting happiness in the world to come—that he believed in a God, the obligation of an oath, and that divine justice would punish perjury and all other offences during this life. But the Court permitted the witness to testify, to which the plaintiff excepted, as also to the charge, on the evidence, and assigns the same as error.

McCLUNG, for the plaintiff in error, submitted the case.

COOPER, contra, as to the competency of the witness, cited, 2 Cowen Rep. 431, 2, and 572, and note.

As to the question of fraud, 3 Cow. Rep. 166; 8 Wendell, 375; 7 Greenleaf 241; 1 Haywood 423; 1 Hawkes 320; 2 New Hampshire 13; 6 Connecticut 277; 1 Pickering 399; 295; 10 *ibid.* 199; 3 *ibid.* 255; 16 Massachusetts 279; 15 *ibid.* 287.

ORMOND, J.—The learned and elaborate opinion of Chief Justice Willes, in the case of *Omichund v. Barker*, Willes' Rep. 538 is the text generally resorted to on this interesting subject. The question in that case was, whether an East Indian, professing the Gentoo religion, who had given evidence on a commission issuing out of Chancery, who had been sworn according to the custom of his religion, was a competent witness

The learned Judge proceeds to show, that the substance of an oath had nothing to do with Christianity—that oaths were more ancient than the Christian religion, and successfully combats the notion of Lord Coke, that an infidel could not be a witness. He expressly lays down the doctrine, "that an infidel, who believes in a God, and that he will reward and punish him in this world, but does not believe a future state may be examined on his oath."

In the case of *Butts v. Swartwout*, 2 Cowen's Rep. 431, a witness professing the same religious belief the witness in this case appears to entertain, was held to be a competent witness. Indeed, if we consider the source of the obligation of an oath, it appears strange that the question should be raised in this enlightened age of the world. An oath is a solemn adjuration to God, to punish the affiant if he swears falsely. The sanction of the oath is a belief, that the Supreme Being will punish

falsehood; and whether that punishment is administered by remorse of conscience, or in any other mode in this world, or is reserved for the future state of being, cannot affect the question, as the sum of the matter is a belief, that God is the avenger of falsehood; see also 15 Mass. Rep. 184.

The question arising on the charge of the Court, is of the utmost importance to the community; and it is but mere justice to the people of the State, that the question should be put on such a footing, that it can be understood and acted on with safety.

Previous to the decision of this Court, in the case of *Hobbs v. Bibb*, 1 Stewt. Rep. 54, the question was in doubt, the Judges on the Circuits many of them holding the doctrine of the case of *Hamilton and Russel*, 1 Cranch 309; which is, that, when possession remains with the grantor after an absolute sale of personal property, it was conclusive evidence of fraud, or as it was termed *fraud per se*; whilst others held that such a state of facts only created a presumption of fraud, which the party affected by it, might repel by showing that the transaction was fair and *bona fide*. To this effect was the decision of this Court in the case of *Hobbs v. Bibb*.

Some time afterwards, the case of *Ayers v. Moore* came under consideration. [2 Stewart 336.] In that case a supposed distinction was engrafted on the case of *Bibb v. Hobbs*, which however, did not, in my opinion, substantially change its character. In the last case, the question at *nisi prius* had been put on the ground alone of the *bona fides* of the transaction; and the Court held that, although the consideration was *bona fide* and paid, yet it might have been done to delay or hinder creditors, therefore the ground assumed on the Circuit was too narrow. Although I am unable to perceive how a transaction could be *bona fide*, and yet made with the design of enabling a debtor to delay or hinder his creditors, yet I have no objection, that this should be considered the test. Upon this footing, the law as I understand it, has remained ever since in this State.

The rule as laid down in the case of *Hamilton v. Russel*, is an artificial and purely arbitrary distinction, which declares that the existence of certain facts shall be conclusive evidence

of a fraudulent intent; and its necessity is supposed to rest on public policy. The opposite doctrine, and such as I understand to be the settled law of this State is, that no transaction shall be considered fraudulent, which is not so in *point of fact*; and supposes the ability in Courts and Juries to eviscerate the truth of the case, and determine whether a transaction be fraudulent or not. Where the former rule imputes fraud from the existence of certain facts, so conclusively as not to admit of contradiction—the latter holds it to be a badge of fraud merely, and requires the party affected by the presumption thus raised, to prove that the transaction is fair and honest..

The question is not now, which of these rules is preferable as a mean of administering justice; but whether it is wise to clog the rule we have adopted by engrafting on it nice and almost insensible distinctions, the inevitable tendency of which would be to embarrass the administration of justice, and to entrap the unwary.

The charge in this case was, if the transaction and sale was upon a fair and sufficient consideration, was *bona fide* and not intended to delay and hinder creditors, it should be supported. This is, in my opinion, a sound exposition of the rule, that possession remaining with the vendör, after an absolute sale of personal property, is a badge of fraud, devolving on the party the necessity of showing that the transaction is honest, and that a sufficient consideration has been paid for it. By so doing, the apparent incongruity of the ownership not being with the possession is explained; and certainly the plaintiff has no claim on the principles of justice, to have his execution satisfied out of property, which does not belong to the defendant in execution. Should the property be suffered to remain so long, that the possessor acquired a delusive credit from the apparent ownership after such sale, another question depending on different principles would arise, which it is not necessary to determine at this time.

Let the judgment be affirmed.

GOLDTHWAITE, J.—I concur in the opinion delivered by Judge Ormond. My impression has been, that the case of Ayers and Moore, was not considered by the Court, as affect-

ing the general rule declared in *Hobbs and Bibb*. The judgment of the Circuit Court in the former case was reversed, because the instructions given by it to the jury, did not conform to the law, as settled in the case last named.

COLLIER, C. J.—I concur with a majority of the Court in the opinion, that the witness who was objected to by the plaintiff in error, on account of his religious opinions, was entirely competent, according to the rule upon the subject, as understood and settled at the present day.

I have not the slightest wish to overrule the case of *Hobbs v Bibb*, 2 Stewt. Rep. 54 ; but am satisfied with it, as explained by the case of *Ayers v. Moore*, *ibid.* 336 ; yet I think that the case at bar is not sustained by the opinion of the Court in the latter. In that case, the Court considered that the circumstance of the negro boy, the subject of the sale, being too young to render service to the vendee, and that he was permitted to remain with his family during his tender years, or that from other circumstances it was not at all convenient for the vendee to take him home, would, if shown to the jury, repel the inference of fraud arising from the possession continuing unchanged. And the opinion of the Court proceeded upon the idea that, although the sale might have been fair, and without intention to defraud any one; yet the legal presumption of fraud from the continued possession of the vendor should be explained away. Such I understand to be the doctrine maintained in *Bissell v. Hopkins*, 3 Cow. Rep. 166; *Swift et al. v. Thompson*, 9 Conn. Rep. 63 ; *Sydney v. Gee*, 4 Leigh's Rep. 535 ; *Gould v. Ward*, 4 Pick. Rep. 104; *Shumway et al. v. Butler*, 8 Pick. Rep. 443 ; *Talcott v. Wilcox*, 9 Conn. Rep. 134.

The charge given to the jury assumes that, if the purchaser of personal property, who has taken an absolute bill of sale for the same, shows that his purchase was on a valuable consideration, and without intention to defraud the creditors of the vendor, the inference of fraud from the possession of the latter is sufficiently repelled. It is certainly necessary to show such facts as will satisfy the jury of the fairness of the sale ; and in addition, according to my view of the law, special reasons

must be shown why possession does not follow the contract of sale.

The possession, unless stipulated for at the time of the purchase, must be regarded as a matter of subsequent arrangement; and cannot be explained by proof that the purchase was fair and *bona fide*. But a majority of the Court think otherwise; and without extending these views, I content myself with declaring, that thus far I cannot assent to their opinion.

TOULMIN v. LESESNE & EDMONDSON.

1. A sheriff who levies an attachment, or writ of execution, should, in a reasonable time thereafter, endorse on the process a *memorandum* of the property seized, or where it consists of so many different articles, that they cannot be thus conveniently endorsed, then he should make out an inventory, and file it with the process.
2. *Semble*, under some circumstances, an appellate Court will reverse on error, for a charge to the jury, which, though correct in the abstract, is calculated to mislead them.
3. A Court will so mould and construe a verdict, as to make it legal, if possible and will never give to it the opposite construction, unless forced by the terms in which it is expressed.
4. A verdict is not vitiated, because the jury find something superfluous.
5. Though a verdict need not follow the language of the issue, yet it must be responsive to it, and so expressed, as to shew, that the jury decided the question submitted to them.
6. Where the defendant was charged in an action of *Trover*, with the conversion of personal property, and the cause being submitted to the jury, on the plea of "not guilty," they returned a verdict, "that the defendant doth detain," &c. the property mentioned in the declaration, and assessed its value. *Held*, that this verdict is insufficient, and that it is not conclusive of *the point in issue*.

THIS cause comes here by writ of error, from the Circuit Court of Mobile.

The defendants in error, declared against the plaintiff in *Trover*, for the *conversion* "of one hundred and thirty pieces of cotton bagging of great value, to wit: of the value of fifty dollars each."

The case was tried on the *general issue*. On the trial a bill of exceptions was taken by the plaintiff in error, to the ruling of the presiding Judge. This bill of exceptions is very imperfect in the statement of facts; yet, we learn, that Noah Harrington, of New Orleans, shipped to Mobile, two hundred and fifty pieces of cotton bagging, to be delivered to Messrs. Lesesne & Edmondson, or their order; that, upon the faith of the shipment, he drew on them a bill, which they negotiated and paid. Messrs. L. & E. received fifty pices of the bagging, and would have received all of it, had it not been for the expense of drayage; to save which, they allowed it to remain in the store of Geo. Harrington, of Mobile. While there deposited, it was testified by a witness who had charge of the store, that it would at any time have been delivered to the order of Messrs. L. & E. It was admitted by the plaintiffs below, that seventy of the two hundred pieces of bagging were sold, while under their control, at thirty-one cents *per yard*.

It is inferable, from the bill of exceptions, that the plaintiff in error, was sheriff of Mobile County; and it is stated that, while the bagging remained in the store of Harrington, it was levied on by a deputy sheriff, who, on his examination said, "That he locked the store in which the goods were situated—that no person was specially in charge—that he visited the store every day or two, and saw no appearance of any interruption of the goods. That in forty or fifty days after the levy was made, he made an inventory, and that there was but ninety-two pieces. That he measured them before the sale, and found — yards."

The Court charged the jury, "That the defendant was not liable for a larger number of pieces of bagging than he took from the plaintiffs; but, if any were lost by the carelessness or negligence of the defendant, he would be liable for them."

Upon this charge the jury retired, and coming in for additional instructions, asked the Court, if the sheriff was bound in any stated time, to make an inventory.

"The Court instructed the jury, that the sheriff must make all due diligence in making an inventory of the goods levied on; for if, in consequence of his failing to do so, loss ensued, he would be liable."

The Court rendered judgment upon a verdict against the defendant below, the entry of which, is in these words: "The plaintiffs and defendant, by their attorneys, came, and also came a jury, to wit: (here are set out the names of the jurors) who, being elected, tried, and sworn, to try the issue joined, upon their oaths do say: we, the jury, find, that the defendant doth detain one hundred and thirty pieces of cotton bagging, named in the plaintiffs' declaration, and assess the value of the same at two thousand, seven hundred and eighty-six and ninety-five one hundredths dollars.

It is therefore considered by the Court, that the plaintiffs do recover of the said defendant, the aforesaid one hundred and thirty pieces of cotton bagging by the jury so found for the plaintiffs; or if the same cannot be had then, that the plaintiffs recover of the defendant, the value of said cotton bagging, to wit: the sum of two thousand seven hundred and eighty-six and ninety-five one hundredths dollars, together with the costs about this suit in this behalf expended."

It is here assigned for error—

1st. That the Circuit Court erred in the instructions to the jury, as stated in the bill of exceptions.

2nd. That the verdict and judgment do not conform to the declaration and issue submitted to the jury.

CAMPBELL, for the plaintiff in error.

STEWART, for the defendant.

COLLIER, C. J.—1. When a sheriff levies an attachment, or writ of execution, it is certainly his duty, in a reasonable time thereafter, to indorse on the process a *memorandum* of the property seized, or if the property levied on, consists of so many different articles, that they cannot be conveniently indorsed, then he should make out an inventory, and file it with the process. If, from the inattention of a sheriff to his duty in this respect, a loss should result, either to a plaintiff or defendant, he would be liable in damages; and if after a levy, he keeps the property so carelessly, that it is either lost or injured, he becomes liable to the action of any person aggrieved. The correctness of these conclusions is not controverted; but it is

argued for the plaintiff that, as the defendants could not have been prejudiced, by the failure of the sheriff to make an inventory of the cotton bagging immediately upon his levy, the instruction of the Court that, "if in consequence of his failing to do so, loss ensued, he would be liable," was well calculated to mislead the jury.

If the defendants in error, were not parties to the process, in virtue of which the cotton bagging was levied on, (and we infer they were not,) it is difficult to conceive, how they could have been injured by the neglect of the sheriff to make an inventory; for, if entitled to recover, the sheriff's return would not be conclusive against them. And it would be competent for them to shew, by evidence *aliunde*, the number of pieces of the cotton bagging; and the evidence of the deputy making the levy, of the number ascertained upon an examination, made some forty or fifty days subsequent thereto, would be less satisfactory, especially if they were accessible to any one else in the *interim*. If the Court had extended the second charge farther, and informed the jury, that no loss could have been sustained by the defendants, in consequence of the sheriff's neglect, it would have been entirely unobjectionable; but without such an explanation, the inquiry made by the jury, clearly shews that they may have been misled.

The last charge then, given to the jury, as a legal proposition, is correct in the abstract; but was inapplicable to the case before the Court, and may to an undue extent, have influenced their verdict. The question arises, is such an instruction objectionable on error? The Judge did not mistake the law; but after having stated it correctly, left it to the jury to make the application. Of his own motion, he should have given to them such further explanation, as was calculated to prevent a misapplication; but it has been questioned, whether an omission to do this, is a sufficient ground for the reversal of the judgment. It is said that, where there is any thing ambiguous in the charge of a Court, calculated to mislead the jury, the attention of the Court should be specifically called to it at the time, or it cannot be alledged as error. [3 Phil. Ev. Cow. & H's notes, 790, and cases cited.] But in *Cothran v. Moore*, 1 Ala. Rep. N. S. 423, it is said that "instructions to a jury

should be direct and certain; when they are argumentative and evasive, the judgment will be reversed, if they are of a character calculated to mislead the jury." But we need not consider this question further, as the judgment of the Circuit Court is more strikingly objectionable upon another ground.

2. The declaration charged the defendant below, with the *conversion* of one hundred and thirty pieces of cotton bagging—the plea denied the allegation; so that the inquiry for the jury was, is the defendant guilty of that charge? To this issue, the jury responded "that the defendant doth detain one hundred and thirty pieces of cotton bagging, named in the plaintiff's declaration, and assess the value of the same at," &c. The question arises, is this verdict responsive to the issue, and does it conclude the matter litigated between the parties.

Courts will always so mould and construe a verdict, as to make it legal if possible; and will never give to it the opposite construction, unless forced by the terms in which it is expressed. [Fisher v. Kean, 1 Watts' Rep. 261.] In McMurray v. O'Neal, 1 Call's Rep. 216, the action was ejectment; and the jury found "for the plaintiff one cent damages." It was held, that the Court might extend the verdict, and make it read "We, of the jury, find for the plaintiff the lands in the declaration mentioned, and one cent damages." The extension was considered allowable, upon the ground, that it was agreed that the clerk might amend form; but "independent of that," the Court say, it was a general verdict for the plaintiff, in a form very commonly used, which the clerk, in his order-book, was to reduce into form according to the issue. This decision was influenced by the agreement of the parties, and the practice in Virginia, and consequently cannot be regarded as an authority here.

A verdict is not vitiated by finding something superfluous. [8 Serg. & Rawles' Rep. 441.] It is said to be not only allowable, but sometimes important to the ends of justice, that the jury should, besides finding the issue, state the ground on which they decided. [1 Peter's C. C. Rep. 72.] And if the jury find all that the party, in whose favor their verdict is returned, is entitled to, and nothing more, neither party can complain of the statement of the reasons, by which they have attained a

conclusion. [Fisher v. Kean, 1 Watts' Rep. 261.] It is true, as we have already seen, that a mere formal defect in the verdict is immaterial. It is not necessary that it should follow the precise language of the issue; but it must be responsive to it, and so expressed as to show that the jury decided the question submitted to them—uncertainty on this point is fatal. [Coffin v. Jones, 11 Pick. Rep. 48; Gregory v. Jackson, 6 Munf. Rep. 25; Richards v. Tabb, 4 Calls. Rep. 522.]

In Coffin v. Jones, which appears to have been an action of debt on an administration bond, the defendant pleaded—1. *Non est factum.* 2. *Solvit ad diem.* 3. *Solvit post diem.* Issues were joined on all these pleas, and the jury found, “that the defendant is not indebted to the plaintiff in manner and form as alledged in the writ and declaration.” In considering the sufficiency of the verdict, the Court thought, that it did not appear that the jury were agreed as to any one of the issues; for they might have been divided in opinion as to each, and yet have agreed in the verdict returned. Some of the jury for instance, might have been of opinion, that the bond had not been executed by the defendant, or that it had been improperly altered, but that no payment had been made; while others might be satisfied with the evidence of the execution of the deed, and also of the payment. If the jury were thus divided in opinion, they could not agree on either of the issues, yet they would all agree that the defendant was not indebted. The issues were not found directly, nor by necessary implication; and as it could not be ascertained by the terms of the verdict, that the jury was agreed as to any of the issues, the verdict was held to be substantially defective and uncertain. [See also Triplet v. Micon, 1 Rand. Rep. 269; Holman v. Kingsbury, 6 N. Hamp. Rep. 104.]

Again—A verdict must be according to the issue and evidence, without respect to the legal sufficiency of the pleadings. French v. Thompson, 5 Vermont Rep. 54—must conclude all the material facts put in issue. [Smith v. Raymond, 1 Day's Rep. 189.]—and must comprehend the whole matter submitted to the jury. [Miller v. Trets, 1 Ld. Raym. Rep. 324.] And if it varies from the issue in a substantial point, or if it find only a part of that which is in issue, it will not be sustain-

ed. [Patterson v. The United States, 2 Wheat Rep. 221; Garrish v. Train, 3 Pick. Rep. 124.]

In *Jewett v. Davis*, 6 N. Hamp. Rep. 518, the rule in regard to the sufficiency of the verdict is laid down thus: if the point on which the verdict is given, be so uncertain, that it cannot be clearly ascertained whether the jury meant to find the issue or not, it cannot be helped by intendment.

In *Moody v. Keenar*, 7 Porter's Rep. 218, the defendant in error declared against the plaintiff, in an action on the case, for negligence in the performance of the duties of a post master; in consequence of which, a letter received at the office of which he had charge (covering one thousand and seventy-five dollars,) with its inclosure, was lost. The case was tried on the *general issue*; and the jury returned a verdict affirming "that the defendant did undertake and assume upon himself in manner and form, as the plaintiff hath complained; and they assess the plaintiff's damages by occasion of the defendant's non-performance of the said undertaking, and assumptions to one thousand and seventy-five dollars." The Court held, that the verdict should not be construed strictly; but should be viewed with the utmost favour, and cite with approbation, the rule as laid down by Hobart, viz: "That though the verdict may not conclude formally and punctually in the *words of the issue*, yet if the *point in issue* can be concluded out of the finding, the Court shall work the verdict into form, and make it serve." After a review of some of the leading authorities on the subject, the Court concluded that the facts found, were substantially variant from those which were in issue, and did not conclude the point in controversy, which was the defendant's negligence.

In the case at bar, the question submitted to the jury was, did the defendant below convert to his own use, as in the declaration alledged, one hundred and thirty pieces of cotton bagging (or any part thereof) the property of the plaintiffs. Instead of responding to this issue, the jury have merely said, "that the defendant doth detain," &c. Now it may be true, that the defendant detained the cotton bagging, without being liable to an action for its conversion. There is nothing in the declaration from which we can infer, that the detention was

tortious, so as to amount to a conversion—possession may have been acquired by a bailment, or in some other manner so as to make its retention perfectly legal.

It cannot be maintained that, by finding the value of the cotton bagging, the jury have impliedly affirmed the illegality of the detention. In *Moody v. Keenar*, the jury found *that the defendant undertook and assumed, &c. and by reason of the non-performance of his undertaking, &c. they assessed the plaintiff's damages at, &c.* Here the jury ascertained the amount of damages, and to whom they were due; but in the case before us, the jury find the fact of detention, and the value of the property, but do not declare from whom it is detained. If in that case the verdict was insufficient to shew that the defendant was guilty of negligence, it must be much less sufficient in the present case, as it merely asserts a fact, which, unconnected with others, would not give a right of recovery.

If the action had been *detinue*, and tried upon the plea of *non detinet*, a finding by the jury that the defendant did *detain*, would be sufficient to shew that the detention was unlawful; but in *trover* the gist of the action is the *wrongful conversion*; and where that is denied by the pleading, to entitle the plaintiff to a judgment, it must be expressly or impliedly affirmed by the verdict.

For the defectiveness of the verdict in not responding to the issue, the judgment is reversed, and the cause remanded, that a *venire facias de novo* may be awarded.

O'HARA v. THE BANK AT HAWKINSVILLE.

1. A note payable in Bank, assigned before it is due, is not subject to an off-set against the original payee, nor can proof be received that it was paid before due.

Error to Benton Circuit Court.

THIS was an action of assumpsit brought by the defendant in error, against the plaintiff in error, on the following note :

Macon, 1st May, 1838.

Nine months after date I promise to pay F. O'Callaghan or order, nine hundred and thirty-nine dollars eighteen cents, at either of the Banks in Mobile, for value received.

J. O'HARA.

The declaration is in the usual form, and judgment for plaintiff below.

During the trial in the Court below, a bill of exceptions was taken; which shows, that it was proved that the plaintiff purchased the note before it became due; but there was no proof that the defendant was notified of the transfer. The defendant then proved the execution of a receipt, signed F. O'Callaghan, bearing date a few days after the note fell due, by which O'Callaghan acknowledged, the receipt from O'Hara of nine hundred and fifty-one dollars and seventy cents, the amount of his note in the Bank of Mobile, which he promised to take out and forward to O'Hara.

The Court, on motion of the plaintiff, rejected the receipt; and the defendant excepted. To revise this decision of the Court, this writ of error is sued out.

CHILTON & MOORE, for the plaintiff in error.

PECK & CLARKE, contra.

ORMOND, J.—In the case of *Smith v. Strader, Perine & Co.*, 9 Porter 446, we held that a note payable in Bank, was, by our statutes, placed on the same footing with inland bills of Exchange, and governed and regulated by the law mer-

chants. Tried by that rule, the proof was clearly inadmissible. No principle is better settled, than that no off-set or proof of payment can be received, as a defence to an action on a note, or bill assigned before it is due. For this reason therefore, if the proof offered was, in other respects, unexceptionable, the evidence was properly rejected, and the judgment of the Court below is therefore affirmed.

FOARD v. WOMACK, USE, &C:

1. Where the drawees of a bill had *no effects* of the drawer in their hands from the time it was drawn up to the time of its maturity, in an action against the drawer, the holder will be excused from proving, that a presentment was made when the bill became *due*, and that notice of the dishonor was *promptly* given, to the drawer; and such is the law, notwithstanding the bill may be drawn in good faith, and if duly presented would have been honored.

Writ of error to the County Court of Sumter.

THIS was an action of *Assumpsit* brought by the defendant in error, in the County Court of Sumter, against the plaintiff as the drawer of a bill of Exchange, for eight hundred and twenty-five dollars, addressed to Messrs. Turner & Lewis of Mobile, dated the 5th November, 1836, and payable twenty-six days thereafter.

The cause was submitted to a jury, who returned a verdict for the plaintiff below; on which judgment was rendered.

On the trial, a bill of exceptions was taken to the ruling of the Court. From this, it appears that the bill of exchange, on which the action was founded, was not presented for payment until forty-four days after its maturity, at which time notice of non-payment was duly given to the defendant below. It was shown, that the drawer had no funds in the hands of the drawees, during the time which intervened between the drawing,

and maturity of the bill; nor even up to the time of its presentment. It however appeared, that the drawer had an open account with the drawees; and had before drawn on them; that they had always honored his bills, and would have accepted and paid the one in controversy. And further, that the drawer was doubtful, whether he had funds in the drawee's hands at the time of drawing.

Upon these facts, the Court charged the jury that, if they believed from the evidence, that the defendant had no funds in the hands of the drawees, during the time which intervened between the drawing of the bill and its presentment, they should find for the plaintiff. The defendant moved the Court to instruct the jury that, although the defendant had no funds in the hands of the drawees at the time of drawing the bill; yet, if the drawees were in the habit of accepting for the defendant, and he had every reason to believe they would accept this bill, he was entitled to notice of dishonor. Which instruction the Court refused to give; whereupon the defendant excepted. The bill of exceptions shows that another instruction was asked and refused; which, as it was not authorised by the proof, and is not considered by this Court, it is deemed unnecessary to notice it

GREEN, for the plaintiff in error.

BOYD, for the defendant.

COLLIER, C. J.—If the reasoning, and some of the conclusions of the learned Judge, who delivered the opinion of the Court in *Hill v. Norris*, 2 Stewt. & Porter's Rep. 114, be regarded as authoritative, the instruction prayed by the plaintiff in error, should have been given to the jury. That case however, so far as applicable to the present, is opposed by the more recent adjudication of *Shirley v. Fellows, Wadsworth & Co.*, 9 Por. 300. In the latter case the Court says, "if one draws a bill, without having funds in the hands of the drawee, for a consideration passing to him, he is the real debtor in the transaction; and even after the acceptance of such a bill, his condition as the primary debtor still continues, although another party has intervened, on whom the law casts the character of

being first liable to all the parties except the drawer. Under these circumstances the law dispenses with notice, or assumes the drawer as chargeable with it; because it would be most iniquitous for him to claim a discharge from an actual debt, when he has either substituted no liability on another, or that other, if he paid the debt, would possess the clear and undisputed right to again recover the amount from his drawer."

The reason, it is said, why the law, in general, requires the holder of a bill to give prompt notice of non-payment by the drawee, is, that the drawer may, by such notice, be enabled forthwith to withdraw his effects from the hands of the drawee, or to stop those which were about to be delivered to him, and to suspend any further credit, and that the drawer and indorsers respectively, take the necessary prompt measures against all parties liable to them, to obtain and enforce payment; and if such notice be delayed, it is a *presumption of law* that the drawer and endorsers have been prejudiced. But where it appears that the drawer had *no funds* in the hands of the drawee, there, the general rule requiring notice of the dishonor of the bill, will not operate. It has been however, said, that of this exception, there are some modifications; and in *Dickins v. Beal*, 10 Pet. Rep. 572, Mr. Justice Baldwin, in delivering the opinion of the Court, undertakes to state them. He says "if the drawer has made, or is making a consignment to the drawee, and draws before the consignment comes to hand. If the goods are *in transitu*, but the bill of lading is omitted to be sent to the consignee, or the goods lost. If the drawer has any funds or property in the hands of the drawee; or there is a fluctuating balance between them in the course of their transactions; or a reasonable expectation that the bill would be paid. Or if the drawee has been in the habit of excepting the bills of the drawer without regard to the state of their accounts, this would be deemed equivalent to effects. Or, if there was a running account between them. In all such cases, the drawer is considered as justified in drawing, as so far having right to draw, that the transaction cannot be denominated a fraud; for in such a case, it is a fair commercial transaction, in which the drawer has a reasonable expectation that his bill will be honored; and he is entitled to the same notice as a

drawer with funds, or authority to draw without funds." To sustain these modifications of the exception, the learned Judge cites 4 Cranch. Rep. 143, 164; 1 Dunf. & E. Rep. 405; 2 Dunf. & E. Rep. 712; 12 East Rep. 175; 15 East Rep. 220; 16 East Rep. 43; 20 Johns. Rep. 149; 4 M. & S. Rep. 229. See also Hopkirk v. Page, 2, Brockb. Rep. 20.

Such is the law as it has been laid down in the Supreme Court of the United States; but the same strictness as to giving notice to the drawer of a bill, of its dishonor by the drawee; has not been generally required, according to the qualifications of the exception recognized in other Courts. In Hoffman et al. v. Smith, 1 Caine's Rep. 160, the Court says that, as the drawer had no effects in the hands of the drawee, he could receive no injury by the omission to give him notice of non-payment; and, that although the bill was accepted, it made no difference. And in the Commercial Bank of Albany v. Hughes, 17 Wend. Rep. 94, the Judge who delivered the opinion of the Court, remarked, "I admit the liability of the drawer or indorser is in general, conditional, and depending on demand and notice; and that the rule should be strictly adhered to. Without demand and notice, he is *prima facie* discharged. He is conclusively discharged, unless it appear, and that clearly, that he could suffer no injury from the laches of the holder."

In the two last cases, cited from the New York Reports, the Court does not pretend to inquire, whether the drawers had a just expectation; that their bills would be honored, but merely whether they were not drawn without funds, or any thing equivalent, in the hands of the drawees; and it is said, that where such is the character of the transaction the drawer could not be prejudiced by the omission of the holder, to give him notice of the dishonor of his bill by the drawee; and consequently, he cannot insist upon the want of it. In the case cited from Caine, it appears that the bill was accepted, a circumstance which shows *prima facie*, that it was drawn in good faith, and on fund either in hands or expected, and that it would be paid at maturity; yet the Court held, that the acceptance made no difference—the drawer could not avail himself of the want of notice, if he had no funds in the hands of

the drawee. [See Eichelberger v. Finley, 8 Har. & Johns. Rep. 381.)

As there is evidently a want of harmony between the cases of Hill v. Norris, and Shirley v. Fellows, Wadsworth & Co., we have thought it proper to take this brief view of the law, touching the necessity of notice of the dishonor of a bill. We are satisfied that the latter case is not only consonant to reason and promotive of justice, but is well sustained by the more recent decisions.

In the case at bar, the objection was not so much to the want of notice, as to the failure of the holder to demand payment of the bill from the drawees, at its maturity. We have considered the necessity of notice immediately upon the dishonor of a bill, and have shown what excuses its omission; because it would seem to follow, that whatever dispenses with prompt notice, will relieve the holder from making a demand *immediately* upon the maturity of the paper.

It has been said, that the contract of the drawer is conditional, viz: That, if the bill be duly presented to the drawee for acceptance or payment, and prompt notice of the refusal given him, then he will himself pay the bill with damages, &c.; and that in order to make this contract absolute, it is necessary that a *presentment* should be made. [Chitty on bills, Barbour's ed., 1839, 300.] But where the drawer could not be prejudiced by the neglect to give notice, the presentment need not be made immediately upon the maturity of the bill. Mr. Chitty says that, "the delay to make a presentment in due time, may however, as far as respects the drawer's liability, be excused by the drawers not having had any right to draw; as where the drawee *had no effects* of the drawer in his hands, from the time of drawing the bill to the time it became due." [Chitty on bills, 300, 389; De Berdt v. Atkinson, 2 H. Bla. Rep. 336; Tery v. Parker, 1 Nev. & Per. Rep. 752.]

In the case before us, the bill was not drawn upon funds, and the drawer could not have been prejudiced by the omission of the holder to demand payment as soon as it became due. His defence then, is not sustained by moral justice, but is opposed by the law itself, and cannot be allowed.

The judgment of the County Court is affirmed.

LAWSON ET ALS. v. TOWNES, OLIVER & CO.

1. To charge a guarantor on his letter of credit, it is necessary that he should be notified that the guaranty was accepted, and the credit given, within a reasonable time afterwards; and also, that demand be made of payment of the principal debtor within a reasonable time after the maturity of the debt, and notice to the guarantor of the failure to pay.
2. When the liability of the defendant depends on notice of a particular fact, such notice must be specially averred, and the general averment, "of all which the defendant had notice," at the close of the declaration, will not be sufficient on demurrer, though it would be aided by verdict.
3. An allegation in the declaration, of the time when the credit was given, is not a description of the note, and will not authorise the rejection of the note, the date being different from the alleged date of the credit.

Error to Talladega Circuit Court.

THIS action was brought in the Court below, by the defendants in error, against the plaintiffs in error, as guarantors of one Walter West. The guaranty is to the following effect:

"TALLADEGA, NOV. 22, 1836.

Whom it may concern. We, whose names are hereto subscribed, do recommend Walter West to be a man of honest character; and that he wishes to procure a stock of liquors and other articles to furnish a confectionery; and that he will be true and responsible for any contract that he may make. And that we, the subscribers, do warrant such contract to be fulfilled. Given under our hands as above."

(Signed by the parties.)

The declaration charges the execution of the letter of credit by the defendants, and its delivery to West; that he presented it to the plaintiffs; and that upon the faith and credit of the guaranty, they sold him liquors and other articles to furnish a confectionery, amounting to the sum of three hundred and eighty nine dollars; that West did not pay the debt when it became due; that they have prosecuted him to insolvency with due diligence; and concludes by averring, "of all which said defendants had due notice," whereby, &c.

The defendants demurred to the declaration, which was overruled by the Court; and, on issue joined, on the plea of non-assumpsit, the plaintiffs had judgment.

By a bill of exceptions, taken during the trial of the cause, it appears that the plaintiffs offered in evidence the record of the judgment against West, together with a writ of *feri facias*, which issued thereon, on which the sheriff returned, "no goods, chattels, lands or tenements to be found in my county to make the money or any part thereof;" also a *capias ad satisfaciendum*, upon which the sheriff made return, "executed on the defendant by arresting his body, and released by giving bond and security for the prison bounds."

To the introduction of these writs of execution, the defendants objected, because they varied from the judgment—the amount of the judgment, as recited in the executions, being eight dollars more than the judgment actually rendered; but the Court permitted the clerk to prove that the variance was a clerical error, and that the executions were issued on the judgment obtained against West; to which the defendants excepted.

The defendants also moved the Court to instruct the jury, that, as it did not appear from the testimony, that West had been discharged from custody, they should presume the judgment was satisfied; which charge the Court refused to give, and charged the jury that, if the judgment was satisfied, it was the duty of the defendants to prove it; to which the defendants also excepted.

The plaintiffs having proved by a witness the sale of the liquors and other articles to West on the 2d December, 1836, and that the note taken of that date from West, was the true date; which note, on motion of the defendants' counsel, was excluded from the jury; because the date of the note, as stated in the pleadings, was the 22d December, 1836. The witness was afterwards re-examined by the plaintiffs; and on cross examination, was asked by defendants' counsel, whether the note which they then handed to him, was not the true date of the transaction. The defendants' counsel then moved to exclude the evidence of the witness from the jury, on the ground that it did not support the averments of the declaration; but the

Court refused to exclude the evidence, and permitted the note to go before the jury, because the testimony had been brought out by the defendants' counsel; to which the defendants also excepted.

The assignments of error are—

- 1st. The overruling the demurrer to the declaration.
- 2d. In admitting the *fi. fa.* and *ca. sa.* in evidence.
- 3d. The Court erred in its opinions as set out in the bill of exceptions.

BAYLOR and WM. B. MARTIN for the plaintiffs in error.

CHILTON & MOORE contra.

ORMOND, J.—The objection taken to the declaration is, that there was no sufficient notice of the acceptance of the guarantee, and of the failure of West, to whom the letter of credit was given, to pay the debt. It is very clear, that the guarantors were entitled to notice that credit had been given to West, on the faith of the guaranty, within a reasonable time afterwards, that they might know the extent of their liability, and, if necessary, be enabled to take the proper steps to secure themselves. As their undertaking was not absolute, but conditional, and depending on the failure of the principal debtor to pay, it was also necessary, to fix their liability; that demand of payment should have been made of the principal debtor within a reasonable time, and notice given to them of his refusal to pay. But it was not necessary to charge them, that legal proceedings should have been commenced and prosecuted against the principal debtor—but only, that the creditor should have used reasonable diligence in making demand, and giving notice of non-payment. This is the general mode applicable to this class of contracts, and peculiarly proper in this case, where the letter of credit was not addressed to any particular person, and was for an indefinite sum. [See *Douglass and others vs. Reynolds and others*, 7th Peters 113; *Lee vs. Deck*, 10th *ibid.* 482; *Onley vs. Young*, 2 H. Black. 613.]

In all cases where the liability of the defendant depends on notice of the existence of a particular fact, such notice is of the *gist* of the action, and should be specially averred; and it

should also appear, that it was given in due time and to a proper person. [1 Chitty on Pleading 321.] The only averment in the declaration of notice, is to the following effect: "The plaintiffs have prosecuted the said West to insolvency, and after using due diligence, have failed to collect the same, or any part thereof; nor has any other person paid any part thereof to said plaintiffs, or other person for them: of all which said defendants had due notice, whereby," &c.

It has been shown that, to fix the liability of the guarantors, it was necessary, within a reasonable time afterwards, to give them notice, that credit was given on the guaranty; and also, notice of non-payment, within a reasonable time after the debt fell due. The general allegation of notice at the close of the declaration, although informal, might be sufficient on general demurrer, if there were facts stated in the declaration on which, by reference, it could operate. It is true it appears when the credit was given, and its amount; but it does not appear when the debt fell due, nor when demand of payment was made, nor indeed, that any demand was in fact made. The suit, which it may be inferred was brought, from the averment, that West was prosecuted to insolvency, might indeed be considered a *demand*; but it is not stated *when* it was brought. It may not have been brought within a reasonable time; and if not, the defendants are not liable, even if notice was in fact given, that the suit had been instituted.

There is, therefore, no liability on the part of the defendants shown in the declaration, as the very gist of the action is omitted. The demurrer, therefore, should have been sustained to both counts of the declaration.

Upon the trial, the plaintiffs, to prove due diligence in collecting the money from the principal, introduced the record of a suit instituted by them against him for the recovery of the debt, and the executions which issued thereon. From what has been said, it appears that no suit against the principal was necessary to enable the plaintiffs to recover of the defendants; the introduction of the record was, therefore, superfluous, except to establish a demand; and in this aspect, the regularity of the executions would not be important; but there can be

no doubt that it was competent for the plaintiff, if necessary, to show, that the executions were in fact issued on the judgments against West, and that the variance was a clerical error.

It has been shown, that the plaintiffs were under no obligation to prosecute the principal to insolvency, to entitle them to their action against the defendants; it is, therefore, not necessary to determine whether, under the circumstances, the return of the *ca. sa.* was a presumptive satisfaction of the judgment; nor do we express any opinion, whether the evidence offered would have established the insolvency of the principal, if it had been necessary to prove that fact.

It appears from the bill of exceptions, that a witness was introduced by the plaintiffs, who proved that a note, which was produced, dated 2d December, 1836, was executed by West, the principal debtor, on obtaining the credit under the guaranty, and that it was the true date of the transaction. This evidence the Court, on motion, excluded from the jury, on the ground that it contradicted the pleadings. The defendants afterwards, on cross examination, asked the witness the same questions, presenting the note to him, which he answered in the same manner; and the Court then refused to exclude the testimony from the jury, on the ground that the evidence was offered by the defendants' Attorney.

It is certainly true, that a party in a cause may offer evidence against himself, which the opposite party would have no right to produce before the jury, and which he will not afterwards be permitted to withdraw; but that does not appear to have been the case here. The defendants' counsel were merely compelling the witness to reiterate that which the Court had before decided precluded the admission of the note in evidence; and we cannot perceive that thereby they waived any right, though certainly a most unnecessary procedure, as the note had been excluded from the jury already. The judgment of the Court, however, in admitting the note in evidence under the proof, was right, though a wrong reason was given for it.

A parol contract, strictly speaking, has no date, and therefore, the *time* of making it is not, as *such*, material. Yet in pleading a written instrument, such as a promissory note, if

there be a mis-description of the date; it will be a variance, and cause its rejection, on the ground that it is not the instrument described in the pleadings. But the rule does not apply in this case, as there was no attempt to describe the note executed by West to the plaintiffs, in the declaration. The allegation is, not that the note was made on a particular day, but that the *credit* was given on the 22d December, 1836, when in fact the credit was given on the 2d December, 1836, and which was also the date of the note. As the date of the credit was not of the essence of the contract, it was not material to be proved as laid in the declaration; and therefore, although an incorrect date was stated in the declaration, as to the time when the credit was given, it was not a mis-description of the *note*; and therefore, could not cause its rejection. The ultimate judgment of the Court being right, the cause would not be revised on this point, because a wrong reason was assigned for the action of the Court.

But for the error of the Court, in not sustaining the demurrer to the declaration, the judgment must be reversed, and the cause remanded.

TOWNS & O'BRIEN v. ALFORD & BUTLER.

1. Where a bond is executed in pursuance of the act of 1828, "the better to provide for the trial of the right of property, and for other purposes," it operates "as a release by the claimant of damages against the sheriff or other officer," taking the property claimed in execution; and consequently, operates as a discharge of the sureties in a bond to indemnify the sheriff, for all damages which may be recovered of him, in consequence of a levy of the process: and such sureties are competent witnesses for the plaintiff on the trial of the right of property.
2. The Judge who presides at the trial of a cause, must have a discretion in regulating and controlling the examination of witnesses. If it is apparent, that a witness is unwilling to give evidence, or is disposed to favor the party against whom he is called to testify, the *direct examination* may assume the character of a *cross-examination*, and the witness be asked a *leading question*.

3. An objection that a question is leading, must be made at the time it is proposed, and if not then made, will not be entertained; and such is the law even where a deposition is objected to, for that cause.

THE plaintiffs in error caused an *original attachment* to be sued out against the estate of Salem C. Garrett, returnable to the Circuit Court of Tallapoosa; which the sheriff levied on a stock of goods in the possession of the defendants, and also by summoning John W. Butler and Berry Horn as garnishees. The defendants claimed the goods levied on as their own property, and executed a bond to try the right to the same, pursuant to the statute. Whereupon an issue was made up and tried by a jury, who found a verdict in favor of the defendants.

On the trial, a bill of exceptions was taken by the plaintiffs to the ruling of the Court, from which it appears—

1. That the plaintiffs offered to prove by a witness, that the sale of the goods in controversy, from Salem C. Garrett to the defendants, was fraudulent. To the examination of this witness the defendants objected, on the ground that he (together with other persons) was a surety in a bond to indemnify the sheriff for all damages, which might be recovered of him, in consequence of the levy of the attachment. This objection was sustained by the Court, and the witness excluded.

2. The defendants offered to read the depositions of three witnesses, who had been examined at their instance: to several of the questions proposed to, and answered by, these witnesses the plaintiffs objected, on the ground that they were leading; but the objection was overruled, and the answers read to the jury. It does not appear whether these depositions were taken upon interrogatories and cross interrogatories filed by the parties, or whether the plaintiffs were present at the examination of the witnesses.

A judgment was rendered in favor of the defendants, and thereupon the plaintiffs have prosecuted a writ of error to this Court.

CHILTON & WM. B. MARTIN, for the plaintiffs in error.

No counsel appeared for the defendants.

COLLIER, C. J.—1. By the eleventh section of the attachment law, it is provided that, if property levied on by an attachment, be claimed by a third person, bond may be given to try the right as in other cases; on which the same proceedings shall be had “as in trials of the right of property taken by virtue of a *fiery facias*.” [Aik. Dig. 40.] The seventh section of the act of 1828, “the better to provide for the trial of the right of property, and for other purposes,” [Aikin’s Digests 171,] enacts that, “so much of the law now in force as requires two bonds to be taken for the trial of the right of property, is hereby repealed: *Provided*, That a claim of property, in conformity to the provisions of this act, shall operate as a release, by the claimant, of damages against the sheriff or other officer, taking such property in execution.”

These statutes relate to the same subject matter, and must be regarded as *in pari materia*, so far as they relate to the right of the property levied on, and the consequences which result from the interposition of a claim. Though the case before us may not come within the letter of the act of 1828, yet we think it is clearly embraced by its spirit and equity. And as that statute releases the officer executing property from damages, at the suit of the claimant, so does the claim of property, levied on by attachment, produce the same result. The sheriff then, being discharged from liability for a trespass committed in the levy of the process, the bond taken for his indemnification became inoperative in law; and the sureties, of consequence, entirely disinterested as to what might be the result of the trial. The witness offered by the plaintiffs was therefore competent on the score of interest, and was improperly excluded by the Court.

2. That a full disclosure of a witness’ knowledge of matters, touching which he is examined, may be elicited, it is necessary that considerable discretion should be left to the Judge who presides at the trial, in regulating and controlling the examination. The Court must regard the inclination of the witness, as well as the subject matter to which the question relates. If it is apparent, that the witness is disposed to favor the party, against whom he is called to testify, or unwilling to give evidence, the Court will be justified in going so far as to permit

the direct examination to take the character of a cross examination; and under such circumstances, it is allowable for a party to propose a leading question to his own witness. The unwillingness of the witness to depose in favor of the party by whom he is adduced—his situation, and the inducements which he may have for withholding a full and fair account, must be decided by the Court, and commonly, according to the impression entertained of his demeanor at the trial. There can then, on this head, be no peremptory and exclusive rule; but it must always be subject to the Court's discretion; and an appellate Court will not enquire on error, whether the Judge of a subordinate jurisdiction exercised his discretion unwisely. [The People vs. Mather, 4 Wend. Rep. 229—248; Stratford vs. Sanford, 9 Conn. Rep. 275—284; Ellmaker vs. Buckley, 16 Serg. & Rawles' Rep. 77.]

Again: The question must be objected to at the time it is proposed, on the ground that it is a leading question. If the objection is not then made, it comes too late, and will not be entertained. The law was so laid down, where the question was asked a witness on taking his deposition. [Sheeler vs. Speer, 3 Binn. Rep. 130; Strickler vs. Todd, 10 Serg. & Rawles' Rep. 63. Objections to questions, on the ground that they are leading, are generally captious, and not intended to subserve the ends of justice; and if a party were liable to lose the benefit of his deposition, on such an objection, taken for the first time at the trial, the rule would often be made to operate the severest injustice. According to the most usual mode of taking depositions in cases at law, the preparation of the questions very often devolve upon the parties, or the commissioners, persons generally selected with a regard to their probity and intelligence, but with little professional knowledge. This state of things certainly requires the adoption of the most liberal and indulgent rules.

The objection to the question excepted to at the trial, came too late. But for the first ground of exception, the judgment of the Circuit Court is reversed, and the cause remanded.

THE ADM'RS. OF MARDIS v. SMITH.

1. The plea of the statute of non-claim, must be pleaded specially. The facts which, under that plea may be given in evidence, cannot be available to an executor or administrator, under the general issue.

Error to Shelby Circuit Court.

THIS was an action of assumpsit by the defendant in error against the plaintiffs in error. The declaration contains the common counts for money lent—money had and received, and an account stated, to which the defendant pleaded—

1. Non-assumpsit—on which issue was joined.

2. And for further plea defendant comes, and says, *actio non*, &c.; because they say they did not assume and undertake; nor did Samuel W. Mardis, their intestate, assume and undertake, as the said plaintiff hath thereof in his declaration complained, within six years next before the commencement of this action; and of this they put themselves upon the country.

3. And for further plea, said defendants say *actio non*; because they say the said plaintiff failed to exhibit his said supposed claim, in his declaration mentioned, to the said defendants as administrators of Samuel W. Mardis, dec'd, within eighteen months after the said defendant had obtained letters of administration upon said estate; nor within eighteen months after publication by said defendants, as required by law, for the exhibition of claims against the estate of their said intestate. Wherefore they pray, that said claim may be forever barred.

4. And for further plea, said defendants say *actio non*; because they say they have well and truly paid said amount of said notes in plaintiff's declaration mentioned; and this they are ready to verify. Wherefore, &c.

5. And for further plea, said defendants say *actio non*; because they say, said Samuel W. Mardis, before his death, well and truly accounted for and paid over all moneys by him col-

lected on the notes specified in said declaration; and this they are ready to verify. Wherefore, &c.

The four last pleas were demurred to, and the demurrer sustained to all, except the second, which was overruled; and thereupon, the plaintiff took issue upon it. The defendant asked leave to plead over the third, fourth and fifth pleas; which the Court refused; and to which refusal, the defendant excepted,

Upon the trial of the issues, the jury found for the plaintiff, and the Court rendered judgment in his favor.

Pending the trial, a bill of exceptions was taken, by which it appears, that the defendant, after the demurrers were sustained to his pleas, asked permission of the Court to plead again the same subject matter; which the Court refused. The defendant further offered by proof to show, that the claim of the plaintiff was barred by the statute of non-claim; and that the same was not presented to them, or either of them, within eighteen months after the grant of letters of administration; which the Court refused, on the ground that the statute of non-claim should be specially pleaded; to which exclusion of the evidence, the defendant excepted. The assignments of error are—

1. The Court erred in sustaining the demurrers to the third, fourth and fifth pleas.

2. The declaration is insufficient.

3. The Court erred in not permitting the defendant to plead over.

4. The Court erred in not permitting the evidence of the failure to present the note within eighteen months, under the general issue.

CHILTON, for plaintiff in error, cited Aik. Dig. 184; 1 Stewart 473.

ORMOND, J.—No objection is taken in the argument, submitted by the plaintiff's counsel, to the declaration; and on looking into it, we do not perceive any objection to it.

The pleas which were demurred to, are not only destitute of form, but are substantially defective. They do not, either of them, present any fact in such a manner, that issue could be

taken on them. This, indeed, is not controverted; but is ascribed to the loose manner of pleading common in the country. There is no agreement in the record, on the part of the plaintiffs, to waive any right; but, on the contrary, from his interposing a demurrer, we must intend he designed to insist on all his rights; and, according to law, the pleas cannot be supported.

The refusal of the Court to permit the defendant to plead over, is matter resting in the sound discretion of the Court, and cannot be revised here.

The offer to prove, under the general issue, the failure on the part of the plaintiff, to present his claim to the administrators within eighteen months after the grant of letters of administration, and advertisement according to law, is a question of some novelty.

The act under which this permission was claimed, is to the following effect; "Executors, administrators and guardians shall not be required to plead specially to any action or suit at law, brought against them in their said capacity; but may, under the general issue, give any special matter in evidence." [Aik. Dig. 184.]

The object of this law was, doubtless, to give greater facilities to those who were, by law, required to defend suits in *auter droit*, and whom the law presumes not to be so conversant with the facts, as the original actor in the transaction; and therefore, more liable to be mistaken in the attempt to present them in the form of a plea. Thus, in the case cited from 1 Stewart 473, the action was covenant; and the Court permitted the administrator to give in evidence a new contract, under the plea of covenants performed, as there was no general issue, properly speaking, in that action. By the aid of this statute, an executor cannot well be surprised by the introduction of evidence of which he had no knowledge before, or knew imperfectly; but, under the general issue, may shape his defence according to the exigency of the case.

But this reasoning can have no application to facts peculiarly within his knowledge; as must be the case, when the defence is a failure of presentation of the claim to him within eighteen months after making advertisement. But that is not

all; when the plea of non-claim is interposed, if the plaintiff does not reply some matter specially in avoidance, the affirmative lies with him; as the defendant cannot be called on to prove a negative, as was held by this Court in the case of *Evans vs. Norris, Stodder & Co.* 1 Ala. Rep. N. S. 511. To give the defendant, therefore, the benefit of the plea of non-claim, under the general issue, would, in effect, be requiring the plaintiff to prove presentation of his claim, as a part of his case. We think it quite clear, that the design of the statute, was not to authorize this class of defendants to demand additional proof of the plaintiffs, beyond, or out of, the issue tendered; but merely permit them to give matter in evidence under the general issue, which, according to the rules of pleading, those defending suits in their own right, would be required to plead specially.

It follows, therefore, that the Court did not err in the refusal to permit the evidence to be given, under the general issue; and its judgment is therefore affirmed.

EX PARTE, NORRIS, STODDER, & CO.

1. Where a plaintiff dies before the return of a writ of error, the writ abates; and can only be revived by the representative of the deceased filing the writ, and transcript of the record, in the appellate Court.
2. If the plaintiff dies before the return of the writ of error, the defendant cannot suggest his death, and move for an affirmance of the judgment, on producing a certificate or citation; for there is nothing in Court on which the suggestion, may be founded; and the consent of the personal representative to be made a party, if the writ is not filed, cannot authorize a judgment of affirmance.
3. If a writ of error is not prosecuted to the return term, it abates by operation of law; and if the plaintiff in error has died, the judgment may be revived, or the bond for the prosecution of a writ of error, may be put in suit.

THE counsel for Norris, Stodder, & Co., presented to the Court the certificate of the clerk of County Court of Sumter, in conformity to the statute, stating that they had recovered a judgment in that Court against one Joel W. Winston; and that

Winston, on, &c., sued out a writ of error to this Court, and executed a bond, with sureties, &c. The counsel then suggested that, since the suing out of the writ of error—plaintiff in error had died, and that Elizabeth E. Winston was the administratrix of his estate; and an attorney of this Court stated that he was authorised by Mrs. Winston, to make her a party to the writ of error, in the place of her intestate. Thereupon, Messrs Norris, Stodder, & Co., by their counsel, moved the Court for a judgment of affirmance, against the administratrix, and the sureties in the writ of error bond.

Boyd, for the plaintiff in error.

COLLIER, C. J.—By the first section of the act of 1820, “concerning writs of error,” it is enacted, that the clerks of the Circuit Courts in this State, respectively, shall issue writs of error, returnable to the first day of the next term of the Supreme Court, and upon the suing out of a writ of error, shall issue a citation, to be served on the opposite party, or his attorney, and returned to the office of the clerk issuing it. *And further*, the citation and a transcript of the record, shall be delivered to the party, applying for the writ of error, or his attorney to be returned to the first day of the next term of the Supreme Court; “and, in case the transcript of the record in the cause below, *and the assignment of errors*, should not be delivered to the clerk of the Supreme Court, on or before the third day of the term, to which the writ of error shall be returnable, it shall be lawful for the Supreme Court, at that term, or at any term thereafter, on motion of the defendant in error, or his attorney, and on producing a copy of the citation,” &c., “or on producing a certificate from the clerk of the Court, from which the writ of error issued,” &c., to affirm the judgment of the Circuit Court, with costs of suit;” unless, &c. (Aik. Dig. 256.)

By the 23d section of the act of 1821, “to repeal in part, and amend an act entitled an act, to regulate the proceedings in the Courts of law, and equity in this State;” it is provided, that writs of error shall lie from the County to the Circuit, or Supreme Court, in the same manner, as from the Circuit to the Supreme Court. (Aik. Dig. 246.)

Our statutes, in respect to the abatement of suits, authorize their revival, (in case the cause of action by law survive,) where either of the parties shall die before final judgment, in the name of the executor or administrator of the deceased party. [Aik. Dig. 259.]

If a plaintiff in error dies, between the time of the suing out and return of the writ of error, the writ abates; and the proceedings can only be revived upon the *representative* of the deceased filing the writ of error and transcript, in this Court; for until this is done, there is no suit pending here, in which the Court would be authorized to entertain a suggestion of the plaintiff's death. The statute authorizes only the plaintiff, or his attorney to apply for, and obtain, and file the transcript, yet, if he dies, his executor or administrator, who succeeds to the management of his interests, must be permitted to prosecute a writ of error, which he had sued out.

The production of the citation, or certificate here, by the defendant in error, does not bring the suit commenced by the deceased plaintiff, into Court; these are only intended to authorize a judgment of affirmance, where there is a default in the prosecution of the writ of error. Such being the purpose to be effected by them, they cannot be recognized, either severally, or together, as constituting a suit, on which the plaintiff's death can be suggested.

In the case before us, it is true, the administratrix voluntarily proposes to permit herself to be made a party in the stead of her intestate. Her consent, it is conceived, cannot vary the law in this respect. The citation or certificate only authorizes a judgment against the party suing out the writ of error; and to enable us to exercise jurisdiction in case of his death, it is indispensable that the transcript should be brought into Court, in the manner the statute directs.

Where the party suing a writ of error dies, it is then allowable for his representative to prosecute it: but if it is not prosecuted to the return term, it abates; and the plaintiff below may revive his judgment, or he may, if a bond has been given for the prosecution of the writ of error, bring his action against the sureties.

The motion of the defendant in error is consequently denied.

COPELAND & LANE, USE &C. v. CLARK.

1. The declarations of a nominal plaintiff cannot be given in evidence, to defeat the action; therefore, where a suit is brought in the name of C. & L. for the use of another, a writing executed by L. dated previous to the execution of the note sued on, if evidence for any purpose, could only be received on proof of the truth of its date.
2. The execution of a note raises the presumption of a settlement of accounts previous to its date.

Error to Talladega Circuit Court.

THIS action was commenced in the Court below by the plaintiffs against the defendant, on a note for fifty-three dollars eighteen cents, dated 25th January, 1839. The defendant pleaded non-assumpsit; set off; payment; and failure of consideration—judgment for defendant.

A bill of exceptions taken during the trial, discloses, that the defendant offered in evidence a receipt for cotton to the following effect:

“January 1, 1837—Received of Abner Clark, three thousand and eighty-six pounds of seed cotton, which is to be accounted for in settlement in store, at two dollars per hundred.”

ROBERT L. LANE.

The defendant also proved, that the claim, due the plaintiffs, was to be settled by cotton, to be delivered to Lane. That, towards the end of the year 1837, Lane did receive cotton, which he said should be accounted for in the store of the plaintiffs; but it was proved that Copeland, the partner of Lane, denied Lane's authority to make any such arrangement. Sometime before the date of the receipt, Lane and one King had been carrying on a store at the same place, where the business of Copeland and Lane was done. That, after the dissolution of the firm of Lane and King, Lane carried on business in his own name up to the time of the commencement of the business of Copeland and Lane.

The plaintiffs objected to the reading of the cotton receipt to the jury, because it was not signed by the plaintiffs, and for other reasons; but the Court overruled the objection; and charged the jury, that they should determine from the evidence, whether it was given to settle accounts in a former store, or accounts which might be created in the one then in existence, under the firm of Copeland and Lane; to which the plaintiff by his attorney excepted, and now assigns for error.

PECK and MARTIN, for plaintiff in error.

CHILTON, contra.

ORMOND, J.—If it be conceded that the ambiguity in the receipt, offered in evidence, could be explained by parol proof, it was not admissible in this case. The only proof of the execution of the paper is, that it was in the hand writing of Lane. This was not sufficient; as the action is brought for the use of another; and it would in effect be allowing the declaration of Lane to be given in evidence, to defeat the action. If it could be admissible in evidence at all, it could only be on proof, that it was executed when it bears date. (See *Chisholm v. Newton and Wiley*, 1 Ala. Rep. N. S. 371.)

The cotton receipt, relied on as an off-sett, bears date the 1st January, 1837; and the note sued on, was made about two years afterwards. Nothing appears in the record to repel the presumption, which arises from this fact, that the cotton receipt was discharged at the time of the execution of the note, if it ever was a charge on the firm of Copeland & Lane. It may be added that most of the parol testimony offered to explain the ambiguity in the instrument, is, as we understand it, wholly irrelevant. The proof that Lane received in the latter part of the year 1837, cotton from other persons, to be accounted for in the store of Copeland & Lane, was entirely irrelevant, and well calculated to mislead the jury.

The bill of exceptions is so badly drawn and illegibly written, as to put criticism and almost even conjecture at defiance; and it is deeply to be regretted, that the rights of parties litigant in our Courts, should depend on such a manuscript as this.

Let the judgment be reversed, and the cause remanded for further proceedings.

MAYO ET ALS. v. STONEUM, EX'R. &C.

1. The official acts of a Judge *de facto*, whose title to the office has not been adjudged insufficient, are valid and irreversible.
2. The correct practice under the statute, which authorizes writs issued upon a joint cause of action, to be executed in different counties, in which the parties against whom they issue, respectively reside, is, to make the writ sent to another county for service, a counterpart of that which is to be executed in the county where it is returnable, indorsing thereon the identity of the cause of action.
3. It has been often adjudged, that it is not permissible to go behind the declaration and reverse a judgment for errors in the initiatory process.

Writ of error to the Circuit Court of Conecuh.

THIS action was brought to recover the amount of two promissory notes, subscribed by all the defendants below.

One writ issued against Mayo and Smith "To any Sheriff" &c. Another issued against Fleming in the same form. Both writs were returned executed, but by sheriffs, bearing different names. On the margin of the record, opposite the latter, are written the words "Branch writ." The declaration is against all the defendants; and a judgment by default is rendered accordingly.

It is assigned for error. 1. That the individual who presided at the term of the Court, when the judgment was rendered, though elected by the two Houses of the General Assembly, the Judge of the tenth Circuit of this State, was constitutionally ineligible at the time of the election, &c. 2. That although two several writs were issued against the plaintiffs in error, a judgment is rendered against them jointly.

CAMPBELL, for the plaintiffs in error.

No counsel appeared for the defendant.

COLLIER, C. J.—1. In respect to the first assignment, it is entirely unimportant whether it be well taken in point of fact; for it is now too well settled, that the acts of a Judge *de facto*, whose title to the office has not been adjudged insufficient, are valid and irreversible, to allow of serious controversy.

2. Supposing that the two writs, which were issued, were executed in different counties, in which the parties against whom they issued, respectively resided, and we think it clear, that the proceeding was irregular under the act, which authorizes the issuance of writs in such cases. The statute directs "that where any joint cause of action shall exist, it shall be lawful for the plaintiff in such suit or action, to sue out two or more writs, directed to the sheriffs or other proper officers, of the different counties, where such defendants or parties, jointly chargeable, may be found; which process such sheriffs, or other officers, shall execute accordingly, and return to the Court from which the same issued, as in other cases; and such writs so issued and returned, shall be filed together, and shall have the same force and effect, and the same proceedings and recovery may be thereupon had, as if one single writ had issued against all the defendants jointly; but it shall be the duty of the clerk or attorney issuing such process, to indorse thereon that both or all of the writs are for the same cause of action; or otherwise the same shall abate on the plea of the defendant." (Aik. Dig. S. 53, p. 267.

The correct practice under the statute, is, to make the writ sent to another county for service, a counterpart of that which is to be executed in the county where it is returnable; indorsing thereon the identity of the cause of action. Whether it would be objectionable to send a writ to another county, against the party only, there intended to be served with it, indorsing it as ancillary process, in the terms of the statute, we need not determine. The absence of the indorsement, that the two writs are for the same cause of action, is made the ground of a plea in abatement, and cannot for the first time be here noticed on error.

In the case at bar, no objection was taken in the Circuit Court to the writs, which seem to have been duly executed—the declaration is against all the defendants, and seeks the recovery of the evidences of debt indorsed on the writs; and we cannot now, without disregarding repeated decisions of this Court, go behind the declaration, to look for errors in the initiatory process.

The judgment is consequently affirmed.

DUNN v. CLEMENT.

1. The declaration states that the note sued on, was made in "Kemper County, Mississippi;" held that the meaning of the averment was, that the note was made in the State of Mississippi, and, as it must be held to be there payable, unless shown to be payable elsewhere; it was error to take judgment by default, and compute the damages without proof of the rate of interest of the State of Mississippi.

Error to Sumter County Court.

ASSUMPSIT on promissory note by the defendant in error, against the plaintiff in error. Declaration in the usual form, which avers that the note sued on, was made "at Kemper County, Mississippi, to wit: the County and State aforesaid." Judgment by default was rendered for the amount of the note and interest.

From this judgment, the defendant procecutes this writ of error; the rendition of judgment without the intervention of a jury, is assigned for error.

COVINGTON & REAVIS, for the plaintiff in error.

STEELE & METCALFE, contra, cited, 2 Porter 239, and Ala. Rep. N. S. 157.

ORMOND, J.—Contracts are construed and governed by the law of the place where they are to be performed. The declaration states that the note was made "in Kemper County, Mississippi;" and as it was not stated that it was not to be performed there, the legal inference is, that it was to be performed where it was made. (*Hamach v. Andrews*, 9 Porter 10) It is however, insisted that we must presume "Kemper County, Mississippi," is the name of some place in the State of Alabama. It is true, that it is not stated that it was in the *State* of Mississippi, but we cannot close our eyes to the fact, that such is the case, and must understand it as all the rest of the world would, to mean the State of Mississippi.

In the case cited from, 1 Alabama Reports, New Series, we

held, that we would not intend that *Geo.* meant the State of Georgia; we are not disposed to question that decision; but we cannot go beyond it. At an early period in the history, of this Court, in the case of *Peacock v. Banks, Minor 387*, the declaration showed that the note was made, and payable in Nashville, in the State of Tennessee; and it was held, that judgment by default, and interest calculated on the note, was irregular. We cannot perceive the difference between that case the and present. If there had been an issue tried between the parties, we would presume that the necessary proof was made of the rate of interest of the State of Mississippi; the judgment being by default, no such intendment can be made.

For this error, the judgment must be reversed, and the cause remanded.

PUGH v. M'RAE.

1. In an action, on the case, against a sheriff for neglecting to arrest a defendant, on civil process, or, for permitting his escape, after arrest, the measure of the plaintiff's damages is the injury sustained by the failure of the officer to discharge his official duty.
2. The *admissions* of a party, whom the sheriff is charged with having permitted to escape, or failed to arrest on civil process, are evidence against the sheriff to show the extent of the liability of the party escaping, or not arrested, to the plaintiff, whether he can or cannot be examined as a witness.

THIS was an action, brought in the Circuit Court of Barbour, by the plaintiff in error against the defendant. The declaration contains two counts. In the first, it is alledged, that the plaintiff sued out of the Circuit Court of Barbour, a writ, for a breach of covenant, against Green Ball; on which writ, bail was required to be taken; that the writ being placed in the hands of the defendant, as sheriff of that county, he executed it upon the body of Ball, but suffered him to go at large, with-

out first executing a bond with bail. The second count alleges a failure to execute the writ according to its mandate. Both counts aver, that the plaintiff has been greatly injured, and delayed in the collection of his damages of Ball; and that he is in danger of losing the same.

The cause was submitted to the jury, who returned a verdict for the defendant.

On the trial, the plaintiff excepted to the ruling of the Court. The bill of exceptions states, the plaintiff offered to prove the declarations of Ball, made before his arrest by the defendant, in order to shew the liability of Ball to respond in damages, in the action brought against him; but the Court excluded all evidence of his declarations, except such as were made subsequent to his arrest and previous to his escape. Whereupon the plaintiff excepted; and judgment being rendered against him, he has prosecuted a writ of error to this Court.

The only question presented by the assignment of errors, is the correctness of the opinion of the Court, as stated in the bill of exceptions.

BUFORD, for the plaintiff in error.

J. D. PHELAN, for the defendant.

COLLIER, C. J.—The defendant is sought to be charged—1st. For permitting the escape of an individual, arrested on mesne process. 2nd. For neglecting to arrest him. The measure of damages, in either case, must be the extent of the injury sustained, by the failure of the defendant to discharge his official duty. [Tombeckbee Bank vs. Godbold, 3 Stewart's Rep. 240; Clark vs. Smith, 9 Conn. Rep. 380; Brooks vs. Hoyt, 6 Pick. Rep. 468.] Hence, it was incumbent on the plaintiff, to shew what sum he was entitled to recover of Ball. It will not be denied, that the admissions of the latter would have been admissible against himself, to shew the amount of his liability; but it has been said, that they cannot be received in an action against the sheriff, to charge him with the plaintiff's loss, consequent upon his neglect; unless they were made subsequent to an arrest, and previous to the escape. Let us inquire, if this distinction rests upon reason and authority.

If the party, against whom process was placed in the hands of the sheriff, was arrested, the plaintiff might prosecute his suit against him, and recover a judgment, upon shewing that he admitted a liability; and he might then, in the action against the sheriff, introduce that judgment as evidence.

What principle of law would prevent the plaintiff from ceasing to prosecute his suit against the party escaping, and seek a recovery against the sheriff, for his breach of duty? If he could do this, should not evidence, which would be admissible against the debtor, be also received against the sheriff? It may have been supposed, that the defendant in the original process, should have been examined, instead of proving his declarations by a third person. Now, it may be regarded as doubtful, upon authority, whether he could have been compelled to testify for the plaintiff. [2 Phillips on Ev. Cow. & H.'s ed. notes, 517—518. But, conceding that he might have been used as a witness against his consent, and it will not necessarily follow, that it was incompetent to prove his admissions by others. If an admission is made in writing, it is clear, that the party, wishing to avail himself of it, must produce the writing, or account for its absence. This requisition rests upon the ground, that written evidence is of a higher grade, than that which is delivered verbally. But, if there be no writing, but only an objection, that the person who pronounced the words, should be produced, and the hearer excluded, it is quite obvious, that this goes not to the *competency*, as founded upon *grade*. Nor can it be regarded as merely hearsay evidence. The declarations of an agent are admissible as those of the principal, though the agent himself might be called as a witness. [2 Phil. Ev. Cow. & H.'s ed. notes, 182—435.]

If the first count be regarded as charging a voluntary escape, Ball would be a competent witness for the defendant; for his interest would be adverse to the latter. In *Waters v. Burnett*, 14 Johns. Rep. 362, it is said that, if the escape was voluntary, the officer could not recover against the prisoner, who was, therefore, interested to procure a verdict in favor of the plaintiff, by which he would be discharged from all liability to the plaintiff on the original indebtedness. [See, also,

Bridge v. McLane, 2 Mass. Rep. 520.] The defendant, then, being authorised to examine the party escaping, might, had he desired it, have had the benefit of his evidence, and explained his declarations, if susceptible of explanation. But the plaintiff could not have examined him, as his own witness, for the reason, as we have seen, that he was interested in his recovery against the defendant; and, if his admissions could not be related by those who heard them, the plaintiff must lose the benefit of them.

If the liability of Ball had been shown by writing, the paper would have been evidence against the defendant, upon the ground, that it contained an admission. True, the writing would be a higher grade of evidence; but the principle, which authorizes its admission, would tolerate the introduction of a verbal declaration.

In the second count of the declaration, the defendant is sought to be charged for a failure to execute process. If the process was never executed, the plaintiff could not have prosecuted his suit, against Ball, to judgment, and might probably be entirely remediless; unless the evidence excluded, had been permitted to go to the jury. The distinction taken by the Court, between declarations made before and after the service of the writ, we think, is not well founded in principle or authority.

Our conclusion is, that the judgment must be reversed, and the cause remanded.

GIVENS AND HERNDON v. THE WESTERN BANK OF GEORGIA.

1. The time within which suits may be brought, or the mode in which they shall be instituted, relate to the remedy, and do not affect the obligation of a contract—therefore, where by the act of incorporation of a bank in Georgia, the bank was permitted to join separate endorsers in the same action, if the bank sue in this State, on a note made to it in the State of Georgia, it must bring separate suits—such being the law of this State.
2. The Courts of this State will give effect to a contract, according to the law of the place where it is to be performed, unless it violates some law of the *lex fori*, or comes in conflict with the established policy of the country; but the *remedy* is governed by the law of the *lex fori*.
3. Every indorsement is a new contract, the rights and liabilities growing out of which, are to be ascertained by the law of the place, where the endorsement is made.

Error to Benton Circuit Court.

THIS was an action instituted in the Court below by the Bank, against the defendants in error, as endorsers of a note to the following effect.

ROME, 11 July, 1838.

Eighty-nine days after date, I promise to pay to the order of Edward Givens, three thousand and twenty-eight dollars and forty-four cents at the Western Bank of Georgia, value received.

ROBERT L. LANE.

The note was endorsed by Givens to Herndon, and by him to the plaintiff. The declaration contains six counts, to each of which there was a demurrer; which was sustained as to all the counts, except the fourth and fifth. These counts alledge, as an excuse for the failure to make a protest, and give notice of the dishonor of the note, a statute of the State of Georgia, entitled an act to incorporate the Western Bank of Georgia, with banking privileges, to be located at Rome; by which it is among other things enacted, that *no notice or protest* shall be necessary to charge any endorser, or maker of any note, or obligation, due said bank; and all makers and endorsers, or their representatives, may be embraced and sued in one action; and

no proof of notice, demand, or protest shall be necessary, or required on any trial, to authorize a recovery.

To these counts the defendants pleaded seven pleas, the first, second, fourth, sixth, and seventh of which were stricken out by the Court on motion; and on the third and fifth, which were nulli corporation and non-assumpsit, the plaintiffs took issue, upon which the jury found a verdict in favor of the plaintiff; and the Court rendered judgment thereon.

From a bill of exceptions, taken during the trial of the cause, it appears that the plaintiff read in evidence the note sued on, and the endorsements; the act of the State of Georgia in incorporating the Western Bank of Georgia; and the act of that State, regulating the rate of interest; and also proved that the Bank commenced doing business as a bank, before the date of the note, which is the foundation of this action; which being all the evidence in the cause, the defendant's counsel asked the Court to charge the jury—

That, if they believed from the evidence, that the defendants endorsed said note in the State of Alabama, then, to entitle the plaintiff to recover, they should have shewn a demand of payment of said note of the maker, and notice of the non-payment to the defendants; which charge the Court refused to give, as no evidence, tending to shew that fact, had been offered.

Second.—That, if the jury found from the evidence, that, if the defendants did not jointly endorse the note to plaintiff, but that Givens endorsed the note to Herndon, and the latter to the plaintiff, they should find for the defendants; which charge the Court refused to give, both because the law did not warrant such a charge, nor was there any attempt to prove, that the endorsement was joint, or that it was from one to the other.

The Court also charged the jury, that it was not material where the note was endorsed, whether in the State of Georgia or Alabama; if the note is payable at the bank, and purchased by the bank, demand, protest, or notice is unnecessary, by reason of the provision of the charter of the plaintiff dispensing therewith: to all which the defendants excepted.

Other charges were moved for by the defendants, and refused by the Court, but as the opinion of the Court does not reach them, they are omitted.

The plaintiffs made many assignments of error, only two of which need be noticed.

1. The Court erred in overruling the demurrer to the fourth and fifth counts of the declaration.

2. The Court erred in refusing to give the charges asked for, and in the charges given.

MOORE, for plaintiff in error, cited 2 Cowens' Rep. 626; 2 Lord Raymond, 1532; 4 John. Chan. 370; 6 Cranch, 22; 12 Johnsons, 142; 3 Mass. 177; 13 *ibid*, 153; 1 Cowen, 103; 4 *ibid*, 508; 9 Porter, 10; Aik. Dig. 329, sec. 11.

J. COCHRAN, contra, cited Story's Con. of Laws, 217.

ORMOND, J.—The principal question arising on this record, and argued at the bar, is, whether the defendants, who were separate endorsers, can be sued jointly. The affirmative of this proposition is maintained by the counsel for the plaintiffs in error, in virtue of a law of Georgia, by which the Western Bank of Georgia, the plaintiff in this action, was incorporated.

The statute is averred in the declaration, as an excuse for the failure to make demand and give notice; and as authority thus to sue; and was also given in evidence. That portion of it which is material to the present enquiry, is to the following effect, "no notice or protest shall be necessary to charge any maker, or endorser of any note, or obligation due said bank, and all makers or endorsers, or their representatives, may be embraced and sued in one action, and no proof of notice, demand, or protest, shall be necessary, or required on any trial, to authorize a recovery."

The counsel for the bank insists, that every one who contracts with the Western Bank of Georgia, submits to be governed by the laws, usages and customs of that Bank; and that by consequence, the defendants, although residing in Alabama, have contracted that their liability should depend on those laws, and usages, and not on the law of this State.

We do not think that any construction which could be put on the Georgia statute, can affect the question to be decided on this point, as it must depend on our own laws. The act however, does not contemplate, that all the indorsements on a note

or bill, shall be considered *joint* undertakings; but that the maker and endorsers may be *embraced* in the same action. The obvious design of the act was not to change the character of the contract, by making that joint, which was several; but to give the bank a right to sue all the parties to the note in one action.

The time within which suits shall be brought, and the mode in which they shall be instituted, relates to the remedy, and does not affect the obligation of a contract. It is too obvious to require argument, that the power to sue one or more endorsers in the same action, can not affect the debt or duty to be enforced by the suit. If then these endorsements had been made in the State of Georgia, as the right to sue both endorsers in the same action, is no part of the obligation of the contract, they cannot both be embraced in the same action in this State. The citizens of other States who sue in our Court, must be governed by the rules we have adopted for the government of our own citizens. It has never been supposed, that the forms by which a contract would be enforced in the county in which it is made; follow it in another county, in which it may be sought to be enforced. The utmost that could be expected, would be that such tribunal would give effect to the contract, according to the law of the place, where it was to have been performed, unless it violates some law of the *lex fori*, or comes in conflict with the established policy of the country.

It follows that if the endorsements were made in the State of Georgia, when the endorsers are sued in this State, they must be sued separately, unless the endorsements were joint in point of fact, which is not the case here; and therefore the demurrer to the fourth and fifth counts should have been sustained.

The Court also erred in the charge to the jury, that it was not material whether the endorsements were made in Georgia or Alabama, if the note was payable to the Western Bank of Georgia, and purchased by the bank; that in either case, the endorser would be liable, without protest, demand, or notice. Every endorsement of a note or bill, is a separate and independent contract; the liabilities growing out of which, are to

be ascertained and measured by the law of the place, where the endorsement is made. This precise question is examined at length by this Court in the case of *Hancock v. Andrews*, 9th Porter, first case to which reference is made, for the reason on which the rule is founded, and the authorities by which it is supported.

The charge therefore, as it assumed, that if the endorsements were made in this State, that the endorsers were liable without proof of demand of the maker, and notice of the dishonor of the note to the endorsers was erroneous.

The questions considered, being decisive of this case, we have not thought it necessary to examine the other questions raised on the record, and commented on at the bar. Let the judgment be reversed.

BARTLETT & WARING v. LANG, ADM'RX.

1. Where the defendant pleads to the declaration, and the cause is submitted to the jury upon issues of fact, the Court should not exclude evidence which tends to sustain the issues, on the part of the plaintiff, because the declaration does not disclose a good cause of action.
2. The act of February, 1839, which authorizes an action to be brought against the representatives of a deceased partner, upon an affidavit being made, that the survivor is insolvent, &c., as it merely gives a remedy at law, in a case in which the remedy was in equity, without any interference with the right, operates retrospectively, so as to embrace liabilities incurred previous to its passage.

THIS was an action of *assumpsit*, brought in the Circuit Court of Mobile, by the plaintiff in error, against the defendant, as the administratrix of Willis Lang, deceased.

The declaration, after describing a promissory note, made by one Henry C. Dade, on the fifth day of March, 1836, for the payment of the sum of six thousand seven hundred and seventy-six dollars and sixty-six cents, twelve months thereafter, to McRae & Lang, alledges, that the same was, on the

day of its date, endorsed to the plaintiffs. The note, it is alleged, was payable and negotiable at the Bank of Mobile; and, at its maturity, was there presented for payment, which, being refused, was protested for non-payment, and due notice thereof given to the endorers.

It is also averred, that, after the death of Willis Lang, one of the endorers, to wit, on or about the third day of April, 1837, the plaintiffs commenced a suit at law, in the Circuit Court of Mobile, against Colin C. McRae, as surviving partner of the firm of McRae & Lang, to recover the amount of the note they had endorsed. That, at the spring term of that Court, 1838, they recovered a judgment against McRae, as such surviving partner, for the sum of seven thousand three hundred and thirty-five dollars and twenty-one cents, including damages and costs.

It is further alleged, that a writ of *feri facias* was issued on the judgment, obtained by the plaintiffs, against McRae, directed to the sheriff of Mobile; on which he made, by the levy and sale of personal and real property, the sum of five thousand one hundred and ninety one dollars and sixty-four cents; leaving a balance, of principal and interest, still unsatisfied, of two thousand seven hundred and four dollars and thirteen cents. As to which balance, the sheriff returned the *feri facias*, "no property found." The first count concludes, that, for the reasons before stated, the defendant became liable to pay the *balance on the judgment*, &c.

The second count sets out the promissory note, its endorsement by McRae & Lang, its presentment at the Bank of Mobile, at maturity, its protest for non-payment, &c., and the death of Lang; and concludes, that, by reason of the premises, the defendant became liable to pay to the plaintiffs, the amount of the note.

The declaration also contains the common counts.

The plaintiffs, before the institution of this suit, made an affidavit in writing, before the Clerk of the Circuit Court of Mobile, and filed it with the papers in the cause, in which they state, that they believe that Colin C. McRae was unable to pay the amount of the debt, sought to be recovered of the defendant.

In the record, we find a memorandum, signed by the defendant's counsel, stating that, "the defendant demurs severally to the counts in this declaration, in short, by consent." Following which, there is a plea of *non-assumpsit*, and a plea denying the endorsement by Lang; which latter plea, was verified by affidavit.

No notice seems to have been taken of the demurrers; but the cause was tried by a jury on the issues of fact.

On the trial, the plaintiffs excepted to the ruling of the Court. From their bill of exceptions, it appears that, "the plaintiffs, to maintain their action, produced, and proved, the note declared on, &c.; and, also, the protest thereof, and proof of notice of protest, properly given, and in due time, to each of the partners of the firm of McRae & Lang; and, also, proof that McRae & Lang were co-partners, and that the endorsement of McRae & Lang was made by McRae, in the presence of, and with the assent and approbation of, the intestate Lang; which evidence was objected to by the defendant, and the same was rejected by the Court, being of opinion, that the action could not be maintained. It appears, that the intestate Lang died in the spring of 1837; that administration was granted to the defendant in the year 1837." The Court decided, that the act of February, 1839, "to amend judicial proceedings at common law, in regard to suits against partners," did not authorise the plaintiffs to maintain their action, inasmuch as it was passed subsequent to the death of Lang, and the grant of administration to the defendant.

"The plaintiffs also offered to prove the recovery of the judgment against the surviving partner, McRae; also, the return of no property found, and the other facts alledged and set forth in the plaintiffs declaration; but all this evidence was excluded." The Court deciding, that the act of February, 1839, did not apply to the case; and, independently of that enactment, the action could not be sustained.

A verdict being found for the defendant, and judgment thereupon rendered, the plaintiffs have prosecuted a writ of error to this Court.

COLLIER, C. J.—The demurrer of the defendants was superseded by the pleas, on which issues were tried by the jury; so that the inquiry in the Court below was not, whether the declaration disclosed a good cause of action, but did the proof offered by the plaintiffs, tend to sustain its allegations. The defendant's pleas impliedly admitted that the declaration set forth in a legal manner, a state of facts, which, if true, entitled the plaintiffs to recover; but denied their truth and called for the proof. If the declaration was so palpably defective, as not to sustain a recovery, the defendant might have availed herself of the defects, on a motion in arrest of judgment, or on error; but it was not competent for the Court to exclude from the jury evidence (otherwise unexceptionable,) which went to prove or disprove the respective averments of the parties.

Now the several matters which the plaintiffs proposed to prove to the jury, viz: the note described in the first and second counts of the declaration; the protest thereof; and due notice of protest to each of the partners of the firm of McRae and Lang—that McRae & Lang were partners, and that the endorsement of the note was made by the former, in the presence of, and with the assent of the latter, &c.—were clearly within the terms of the issues. And even if the action was not maintainable, as that question was not raised, the evidence should not have been rejected.

But without pretending to inquire whether any, or which of the counts of the declaration are defective; we are satisfied it was competent for the plaintiffs, by following the directions of the act referred to, by the Judge of the Circuit Court, in his charge to the jury, to maintain an action against the representatives of a deceased partner, upon an endorsement made by partners previous to its passage. That statute enacts, "that where any person or persons shall have a cause of action against any copartnership, any members of which may have died, such person or persons shall be permitted to sue and recover of the representatives of the deceased partner, or partners, without first having prosecuted the surviving partners to insolvency, any law, usage, or custom to the contrary notwithstanding: *Provided*, the plaintiff shall, before instituting such suit, make affidavit in writing before the clerk of the proper

Court, or Court itself, to be filed with the papers, that the survivor is insolvent or unable to pay the amount of the debt, or is beyond the jurisdiction of the Court: *Provided, however*, that when any such representative is sued separately, which may be done without such affidavit, no execution shall issue against such representative, until an execution is *bona fide*, run and returned *nulla bona*, as to the survivors." [Pamphlet Acts of 1838-9.]

That this statute is not well expressed, no one can deny; yet we apprehend, it sufficiently indicates the purpose intended to be effected by it. In *Marrs. Ex'rx. v. Southwick, Cannon & Warren*, 2 Porter, 370, (a case determined in June, 1835,) it was decided, that, "the act of our Legislature, which enacts that, whenever any cause of action may exist against two or more partners of any denomination whatever, it shall be lawful to prosecute an action against any one or more of them," [Aik. Dig. 268,] did not place partners, and their executors and administrators upon the footing of joint and several obligors or promissors. To give that statute such a construction, the Court say, "would have the effect of subjecting the assets of deceased partners, to the payment of the partnership debts; while the surviving partner would have the exclusive control of all the partnership funds, out of which the partnership debts ought in justice to be paid." The Court concluded that, by the common law, the debts of partners are joint; and by the death of one, they become extinguished as to his testator or intestate, and can only be revived in equity. To abrogate the decision in the case cited, so far as it held the remedy at law extinguished, as against the representatives of a deceased partner, the act of February, 1839, was enacted. Without attempting an exposition of this act, further than the case before us requires, we are prepared to say, that we can discover nothing in its terms, which indicates the intention of the legislature, that its operation should be merely prospective. The literal import of the language employed, extends to all causes of action "against any copartnership," &c. without reference to the time when it occurred.

The statute, we have seen, is remedial; it gives to the creditor a remedy at law, in a case in which it was previously ne-

cessary for him to resort to equity. It being a mere transfer of a remedy from equity to a court of law, in order to enforce a pre-existent right, according to a cardinal rule of construction, the statute must be liberally expounded ; and must consequently embrace causes of action, existing previous to its enactment. A statute which merely changes the *remedy*, it has been often holden, both in this Court and others, may, where such seems to have been the intention of the legislature, operate retrospectively. The death of Willis Lang, and the grant of administration to the defendant, previous to the passage of the act, it seems to us, can have no influence upon its operation.

It will follow, from what we have said, that the Judge of the Circuit Court erred in his views of the law, as stated in the bill of exceptions.

The judgment is consequently reversed, and the cause remanded.

BOWIE v. MINTER, ET ALS.

1. Infants must, in order to the recovery of their rights, *sue in their own names by their guardians*, instead of making their guardians the principal actors in the cause ; and this is the rule, as well in equity, as at law.
2. The office of a *supplemental bill*, is to supply a defect, which has arisen in the progress of the suit, by the happening of some event *subsequent* to the filing of the *original bill* ; and its object is, to bring before the Court, matters which have occurred *since* that time.
3. Where the *original bill* is itself defective, the *deficiency* may be cured by an amendment.
4. The appropriate proceeding, when new parties, with new interests, arising from events *since* the institution of the suit, are to be brought before the Court, is *an original, in the nature of a supplemental bill*. Such bill is, in effect, the commencement of a new suit, but may, in its consequences, draw to itself the advantage of the proceedings on the former bill.
5. Where a suit in equity abates by death, or marriage, the proper means of restoring vitality to the cause, is by a *bill of revivor*, to be filed, by or against the person, who comes in, *in the same right* with the original party.
6. The proper office of a *bill of revivor and supplement*, is to revive a suit that has abated, and to supply any defects in the original bill, arising from subsequent

- events ; but the supplemental matter must have been newly discovered, and verified by affidavit.
7. Where an individual describing himself, as the guardian of certain infants, files a bill *in his own name*, the infants cannot file a supplement thereto, or an original in the nature of a supplemental bill, which shall give them the advantage of the suit commenced by their guardian ; and though, one of the infants, who is a female, marry, herself and husband cannot file a *bill of revivor and supplement*, because she was not a party to the original cause.
 8. A bill filed by infants, on attaining their majority, or marriage, which refers to one, filed by their guardian, *in his own name*, while they were in wardship, but does not recite its substance, will not authorise a decree in their favor, such as the guardian himself sought.
 9. Where a person, having no interest in the matters litigated, is made a complainant in equity, the bill should be dismissed for a misjoinder of plaintiffs.
 10. A supplemental bill cannot be filed without leave of the Court ; but *quere*, will not the subsequent assent of the Court, cure the irregularity?

This cause comes here by writ of error, from the Court of Chancery sitting at Cahawba.

In August, 1836, the defendant in error, Wm. T. Minter, filed his bill in equity, stating that he had been lately chosen, and legally appointed, the guardian of George J. and Sarah R. Bowie, infant heirs of John Bowie, deceased; of whose persons and estates, the plaintiff in error had been a guardian, from the year 1827, until a short time previous thereto. The bill then alledges, that the defendant below resigned his guardianship; and charges, that he has in his possession sundry slaves, and a large sum of money, belonging to his late wards, of which an account is prayed, and such decree touching the same, as is agreeable to equity, &c.

To this bill, the defendant filed his answer. Thereupon, the complainant, Minter, on the 30th September, 1837, filed what professes to be, a supplemental bill, though, it does not appear that leave was first obtained for that purpose. This bill, in addition to other statements, sets out the names of sundry slaves of the complainant's wards, then in the defendant's possession, and prays, that the defendant be enjoined from removing them ; and that he have them forthcoming, to abide the final order or decree of the Court. Whereupon, an injunction was issued, and a bond with surety, in the sum of twenty thousand dollars, executed by the defendant ; conditioned to have

the slaves forthcoming, to abide the decree of the Court in regard to them. This bill was also answered.

After testimony had been taken by the complainant, Minter, another bill, professing to be a supplemental bill, was filed, without leave, either asked or given. The introductory part of that bill, is as follows: "Your orators, William T. Minter and George J. Bowie, and your orator and oratrix, Lard M. H. Walker and Sarah R., his wife, that on or about the 9th day of August, 1836, your orator, William T. Minter, then guardian of your orator, George J. Bowie, and your oratrix, by the then name of Sarah R. Bowie, exhibited his original bill of complainant in this Honorable Court, against George Bowie, late guardian, &c., as defendant thereto." The bill, then states the filing of the original and supplemental bill by Minter, and the proceedings which have been had in each; and by way of supplement, sets forth an ante-nuptial agreement between Lard W. H. Walker, of the first part, William T. Minter, guardian of Sarah R. Bowie, [now Mrs Walker,] of the second part, and George J. Bowie, [trustee] of the third part; which, it is alledged, was executed in May, 1838. By that agreement the property and estate of Mrs. Walker, whether in action, or possession, was secured to her, free from the claim of her husband, his creditors, or purchasers under him. The bill then, prays that the ante-nuptial contract, may be considered as valid; and one moiety of what may be recovered of the defendant, be decreed to be settled according to its stipulations. To this bill, the defendant also, filed an answer, and insisted upon the benefit of a demurrer therein; because it was filed without leave of the Court.

All these bills came on to be heard together; and the Chancellor rendered his decree, declaring that the slaves in the defendant's possession, alledged to be the property of his wards, were subject to distribution as such; and referred it to the Master, to take an account of their time, and of defendant's expenditures, &c. The decree, further gave effect to the trust declared by the ante-nuptial agreement, and directed, that the defendant pay all costs, to be taxed, &c.

The view taken of this case, renders it unnecessary to state

with particularity, the matters disclosed in the bills and answers, or to notice the proof in the record.

This cause was argued with very great ability, both upon the merits of the controversy, and upon the regularity of the proceedings, by J. B. CLARK and J. A. CAMPBELL, for the plaintiff in error, and EDWARDS and G. W. GAYLE for the defendants; but as the questions arising upon the latter branch of the argument, are alone considered, it is deemed unnecessary to report an abstract of the points made by counsel.

COLLIER, C. J.—It is objected by the plaintiff in error, that, without reference to the substantial merits of the controversy, the Chancellor should have dismissed all the bills which were submitted to him at the hearing. 1. Because Wm. T. Minter was the sole complainant in the original, and first supplemental bill, while the case stated, shows that his wards should have been the *actors* in the cause, by him. 2. Because the last supplemental bill was not good as an original, so as to sustain the decree, or if good as an original, it was demurable; because Wm. T. Minter, who does not appear to have been a proper party, was made a complainant—and because the same was filed without leave of the Court.

It is clear, that the original, and first supplemental bill are exhibited at the instance of Minter himself. True he describes himself as the guardian of certain persons, whose names he mentions, and the cause of complaint, is one in which his wards are alone interested; yet, as the plaintiff in error, is called on to answer to him individually, he must be regarded as the real party complainant. No decree, on the hearing of these bills, could be rendered, either for or against the wards; they are not described as parties, nor is any prayer made for relief in their behalf.

In *McLeod v. Mason*, 5 Porter's Rep. 223, there was a settlement in the Orphans' Court of Madison, of the accounts of the plaintiff, the former guardian of A. T. Heath, with the defendant, the guardian at that time. After ascertaining the sum due by the plaintiff, as guardian, the decree proceeded as follows: "on motion of Samuel Peete, attorney for George Ma-

son, guardian of Adaline T. Heath, infant child, &c, it is considered by the Court, that said guardian recover of and have execution against George McLeod, late guardian of said Adaline T. Heath, for the sum, &c. This order was made subsequent to the rendition of the decree, ascertaining the amount in the hands of the former guardian, and the Court say, "we look upon this order for an execution, as wholly unnecessary; yet, we are not permitted to disregard it, for it was made at the same time, and by the same authority, that the decree was, and controls it, by confining the right to sue out execution in his own, name to the guardian." And further, "in prosecuting a suit for the benefit of a *ward*, the guardian should describe the ward upon the record, as suing by him, as thus: A. B. an infant, &c., by C. D., his guardian; and the judgment should pursue the process and declaration."

In *Sutherland v Goff*, 5 Porter's Rep. 508, the declaration commenced thus: "Martha T. Goff, guardian of Eliza A. Goff, complains of John Sutherland in custody, &c." The subject of the controversy was one which concerned the interest of the ward, as was shown by the pleadings; yet, the Court held, that the action was not well brought. And in *Gregg, et al. v. Bethea*, 6 Porter 9, it appears that the guardian of an infant moved the Orphans' Court, for an order upon the executor of the ancestor of the infant, to pay over a sum of money to the guardian, to defray the charges of maintenance. It was held, that the application to the Orphans' Court, should have been made in the name of the ward, and judgment rendered in his favor; and that consequently, the proceeding by the guardian in his own name was irregular.

In the case before us, it is not pretended that Minter had been in the possession of any of the negroes, which he sought to recover; or that there had been any contract, between the plaintiff in error and himself, in regard to the estate of his wards; but the avowed object of his bill, is the recovery of money and property, which it is alledged, the former guardian holds in trust for the wards. So, that, if a previous possession by the complainant, or a contract with him, would allow a remedy in his own name, nothing of the kind is shown; and the cases cited, must apply with all force, unless a rule obtain in

equity, different from that which has been recognized at law. We think that the law, in regard to the right of the guardian to sue, must be the same in both Courts. In the case stated, in the original and first supplemental bill, it is clear, that the legal right is in the wards; and as they are entitled to whatever may be recovered, it requires no argument to prove that they have the beneficial interest also. And, as a Court of equity looks rather to the right of use and enjoyment, than the mere naked right of possession, it would seem the more imperiously to require, that the wards, instead of their guardian, should be the actors in the cause. It follows therefore, that, as these bills were filed by Minter, instead of the wards, in whom the legal, as well as equitable interest in the matters to be litigated, was vested; they should have been dismissed by the Chancellor.

2. The last bill filed in the cause cannot aid, or be aided by those previously filed. True, it professes to be a supplemental bill, yet, it cannot be regarded as such; for a bill of that description is filed, for the purpose of supplying a defect, which has arisen in the progress of the suit, by the happening of some event *subsequent* to the filing of the original bill. And the object of it, is to bring before the Court, matters which have occurred *since* the original bill was filed; hence it has been held, that whenever a defect can be remedied by amendment, a supplemental bill will not be allowed. Where a complainant discovers any *original* deficiency in his bill, he is at liberty, up to the time of joining issue, to cure the omission by amendment; and that, for the purpose of merely adding formal parties, the amendment may be made at any period of the suit. If, however, such parties are rendered necessary, by any circumstance, having occurred after the bill was filed, there must be a supplemental bill.

A supplemental bill is merely *in continuation* of the original suit, and filed for the purpose of filling up such a deficiency, as does not cause a material alteration in the matter in litigation, or a change of the principal parties; and when, therefore, it is only requisite to *add* something to the former proceedings in order to attain complete justice. But an original bill, in the nature of a supplemental bill, is properly applicable,

when new parties, with new interests, arising from events since the institution of the suit, are to be brought before the Court. The latter being to all intents and purpose, the commencement of a new suit, which, nevertheless may, in its consequences, draw to itself the advantage of the proceedings on the former bill. Story's Eq. Pl. 268 to 281 ; Lube's Eq. Pl. 136 and 7 ; Stoford v. Howlett, 1 Paige's Rep. 291 ; Eager v. Price, 2 Paige's Rep. 333 ; Mitford's Pl. 49, 78 ; 3 Atkins' Rep. 217

If, in the progress of a suit, a *feme* plaintiff marry, or any other event should occur, by means of which the original suit falls to the ground, in consequence of there being no longer before the Court, any person by, or against whom the suit can be continued ; the Court will, in such case, permit a bill to be filed by or against the person, who comes in, *in the same right* as the original party, and *whose title cannot be controverted*, praying that the suit and proceedings upon it, may be restored to the same plight and condition, as for or against the new party, in which it stood with respect to the original party, through whom the abatement was caused. Such bill, is termed a bill of revivor, and can only be had by or against the heir, executor, or administrator of a deceased party, or the husband of a *feme* plaintiff ; for they alone come in by *a title that cannot be litigated*. [Lube's Eq. Pl. 140.]

A bill of revivor and supplement, is said to be a compound of a supplemental bill and bill of revivor ; and it not only continues the suit which has abated, but supplies any defects in the original bill, arising from subsequent events ; and where a complainant has a right to revive a suit, he may add to the bill of revivor such supplemental matter, as is proper to be added. But the supplemental matter must have been newly discovered, and verified by affidavit ; and may be demurred to, by the defendant. [Westcott v. Cady, 5 Johns. Ch. Rep. 242 ; Douglass v. Sherman, 2 Paige's Rep. 360 ; Pendleton v. Fay, 3 Paige 204 ; Randolph v. Dickinson, 5 Paige's Rep. 517.]

If the original suit had been brought in the name of Sarah R. Bowie, upon her marriage, it might have been revived in the name of herself and husband ; and the ante-nuptial contract in regard to her estate, stated by way of supplement to the bill of

revivor. But such was not the condition of the cause; the suit was brought and continued up to the filing of the last bill, in the name of Minter; and did not abate, so far as the record informs us.

We have seen that the bill under consideration, cannot be regarded as a supplemental bill, or as an original bill, in nature of a supplemental bill; because the interest of George J. and Sarah R. Bowie existed previous to the commencement of the suit. And in respect to the interests which have since vested in Lard W. H. Walker, that cannot be brought to the view of the Court by a bill of revivor and supplement, because his wife was not previously a party to the cause.

The original bill was so defective, as we have seen, that no decree could have been rendered upon it in favor of the complainant; and as the interests of his wards were then existing, it could not be aided by a disclosure of their interest, through the medium of a supplemental bill.

And even, if we could regard the bill, we are examining as an original, the defendants in error, would not be entitled to a decree under it for the slaves, and their hire which was the object of the suit. This bill does not recite the substance of those filed by Minter, or any other facts from which the Court of Chancery could ascertain the matters in controversy. It merely states the proceedings had on those bills—recites the ante-nuptial agreement—prays that the suit by Minter, may stand revived in the name of himself and the other complainants; and in addition to the prayers of those bills—prays that the trust of the ante-nuptial agreement may be established; and that such further relief as may be proper, be granted, &c. The original and supplemental bill of Minter being out of the way, there would remain before the Court no bill, which would authorise a decree against the plaintiff, for the settlement of the accounts of his guardianship.

Again: If the bill was good as an original, would it not be defective on general demurrer, for having made Minter a complainant, not as the guardian of George J. Bowie, but in his own right? As George J. Bowie complains for himself, we infer that he had attained his majority before the bill was filed; and Sarah R. having married, her husband became her

guardian by operation of law. Upon this supposition, what interest remained in Minter, that made it necessary, or even proper, that he should be made a party? It was not at all essential to the ante-nuptial agreement, that he should have joined in it, as the guardian of Mrs Walker. He could not have affected her interest by any stipulation of his; and it would have been quite as binding upon the creditors and purchasers of her husband, without, as with his approbation. But we decline deciding, [as it is unnecessary,] whether Minter was an improper party, so as to have required a dismissal of the bill for a misjoinder of complainants. [Moore et al. v. Armstrong et al., 9 Por. Rep. 697.]

It has been often holden, and such may be considered the established practice, that a supplemental bill cannot be filed without leave of the Court. [Eager v. Price; 2 Paige's Rep. 333; Story's Eq. Pl. 270; Walker et al. v. Hallett; 1 Ala. Rep. N. S. 379.]

But whether the objection, that it was filed without a previous order for that purpose be available on demurrer, or whether the subsequent assent of the Court, will not cure the irregularity, are questions which we deem it unnecessary to decide; as the proceedings in the case at bar, are so radically defective that they cannot be thus perfected.

Without examining the interesting questions discussed at the bar, we are of opinion, for the reasons already stated, that the Chancellor should have repudiated the cause. His decree is therefore, reversed; and the several bills filed by Minter, as well as that filed by the defendants in error, dismissed without prejudice; and that the defendant, Wm. T. Minter, pay the costs of the original and supplemental bills filed by him; and that all the defendants pay the costs of the last bill filed as a bill of revivor and supplemental bill.

CULLUM ET AL. v. BATRE'S EX'RX.

1. Whenever the interest of a party to a suit in Equity, becomes vested in another, by death or otherwise, the proceedings abate, either in whole or in part; and the regular mode of reviving in the name of the party, on whom such interest devolves, is by a *bill of revivor*.
2. Defective notices and irregularities in practice, are waived, if the parties appear, and proceed in the cause without objection.
3. An order of publication was duly made, and published, in order to bring in a non-resident defendant; and a decree *pro confesso*, rendered against him; but the record did not show, that publication had been made. *Held*, that it was allowable, even after a writ of error sued out, to prove that fact, and have it recited on the record in the Court below, *nunc pro tunc*, so as to prevent a reversal of the decree.
4. To a bill to foreclose a mortgage, a subsequent incumbrancer is a *proper*, but not an *indispensable*, party.
5. The object to be effected by joining a subsequent incumbrancer, as a defendant, with the Mortgagor, is merely to conclude him as against the complainant; and to secure to the purchaser, under the decree of foreclosure, a title not liable to be attacked by such incumbrancer.
6. A subsequent incumbrancer, who is made a defendant to a bill of foreclosure, is not entitled to a decree against the mortgaged premises, for so much as may be due on his mortgage.
7. In the order, referring a bill of foreclosure, &c., to a master, to report an account, it is stated, that the "mortgage and notes" were "produced, and proved to the Court;" and the master reported, "that, on comparing the mortgage, bill, and notes, he finds due the complainant two notes, dated," &c. *Held*, that these recitals, together with the possession of the mortgage and notes, by the complainant, was sufficient to show that her testator was the proprietor of the notes by assignment; especially after a decree *pro confesso*.
8. It is not, in general, irregular to authorize the master to sell the mortgaged premises "in separate lots, or in whatever manner may best comport with the interest of the defendant; unless infants are interested, and then, it should be referred to him to report in what manner their interest should be sold.
9. A decree for a foreclosure and sale of mortgaged premises, is not erroneous, because it does not *expressly* require the master to report his proceedings to the Court, but directs him to make a deed to the purchaser.

CHARLES BATRE, the testator of the defendant in error, in April, 1838, filed his bill on the equity side of the Circuit Court of Mobile, against Chas. Cullum, Burlin Brown, Thomas J. Cawley and Charles Gascoigne, for the foreclosure of a mortgage of a tract of land, situate in the County of Mobile. The

mortgage was executed to Geo. J. S. Walker, by Brown and Cawley, to secure two promissory notes, amounting, in the aggregate, to the sum of three thousand six hundred fifty-seven dollars and fifty cents; and the notes and mortgage were transferred to the complainant.

It is further stated, that Cullum is the grantee of the mortgaged premises, by purchase from the mortgagor; and that Gascoigne is a subsequent incumbrancer by mortgage.

On the 17th April, 1838, a subpœna issued for all the defendants, but Gascoigne; and was executed on Cawley and Cullum. At the next succeeding term of the Court, an order of publication was made as to Brown, upon a showing that he resided without the limits of the State.

At the fall term of the Court, holden in 1838, an order was made in these words: "The complainant's death being shewn, and Adele Batre being the executrix of his last will and testament, it is ordered by the Court, that the cause stand revived, and that she be permitted to have the benefit of all the proceedings had in the cause. The complainant has leave to amend by adding an additional defendant."

On the 5th April, 1839, Gascoigne filed his answer; in which he admits the making of the mortgage and notes described in the bill; and states, that Brown and Cawley, on the 8th day of September, 1836, made their promissory note payable to him, at four months after date, for two thousand dollars; which was secured by a mortgage of the premises in controversy, bearing even date therewith, executed by Brown. The respondent admits, that Brown and Cawley have paid him one thousand dollars on the note; but insists that the balance, with interest, remains unpaid. He prays an account, &c.; and that, if the mortgaged property shall produce a sum sufficient to pay the debt of the complainant, then, the surplus, if any, may be paid to him.

About forty days after the answer of Gascoigne was filed, the bill was taken *pro confesso*, as to Brown, Cawley and Cullum, for failing to answer. Up to this step in the cause, the record does not show that publication, as ordered, was made as to Brown. The decretal order, after reciting that the bill was taken *pro confesso*, continues, "and the mortgage and

notes being produced and proved to the Court, are, with the bill, referred to the Register to take an account between the parties, and report the same to the Court at this term."

At the same term, the master made his report, stating the sum due on the mortgage, which the bill seeks to foreclose; and, also, that "there is due to C. Gascoigne, on a promissory note, one thousand one hundred and eighty-nine dollars and ninety-nine cents." Thereupon the Court confirmed the report of the master; and adjudged, that the amount due on the mortgage, of which Batre was the assignee, should be first paid. The decree directs, that the defendants, within sixty days, pay into the office of the Register, "the amount reported to be due as aforesaid, with interest and costs; or, in default thereof, that then the Register aforesaid, sell the premises described in the complainant's mortgage," &c.; "that he sell the said premises in separate lots, or in whatever manner may best comport with the interest of the defendants. That he make a deed to the purchaser, and of the moneys arising from said sale, he pay the costs, and the complainant's demand, in the manner reported by the master; and the balance, if any, bring into this Court, to abide its future order. And after said sale, the defendant's equity of redemption in and to said premises, be barred and foreclosed."

After the writ of error was sued out, the order of publication, made pending the cause in the Circuit Court, as to Brown, was produced in the Court below, printed in the paper in which it was directed to be made; and the Register stated on oath, that it was duly published for the length of time required. The order of publication, and the evidence of the Register, were, by direction of the Court, spread upon the record *nunc pro tunc*, and have been sent up in answer to a *certiorari*, issued from this Court, founded on the suggestion of a diminution.

This cause, upon the organization of "Separate Courts of Chancery," was transferred to the Chancery Court sitting at Mobile; and, by that Court, the final decree was rendered. The defendants have prosecuted a writ of error to this Court; but, under the rule upon the subject, Cullum and Brown alone, have assigned errors.

STEWART, for the plaintiffs in error.

CAMPBELL, for the defendant.

COLLIER, C. J.—It is objected to the decree of the Chancellor—1. That the suit abated by the death of the complainant, and has not been regularly revived. 2. That the defendant Brown was not brought into Court, so as to become subject to its decree, either by service of process, or publication. 3. The bill having been amended, after subpœna served on two of the defendants, and publication ordered as to a third, the decree *pro confesso* was erroneous; because it should have been preceded by new process. 4. That no decree could have been made in favor of the defendant Gascoigne for the amount due on his mortgage, without a cross bill.

5. That neither the bill itself, nor Gascoigne's claim, was sustained by proof to warrant the decree.

6. That the decree is erroneous, in not settling how the property shall be sold; and in directing a deed to the purchaser before the sale was confirmed.

7. That Cullum's title is subjected to the payment of Gascoigne's debt, without any bill filed by Gascoigne; and when it does not appear, that he claims under an older or superior title.

1. In *Doe ex dem. Duval's heirs v. McLoskey*, 1 Ala. Rep. N. S. 708, it was decided, that, whenever by death, or otherwise, the interest of a party to a suit becomes vested in another, the proceedings abate, either in whole or in part. For, as far as the interest of a party dying extends, there is no longer any person before the Court, by, or against, whom the suit may be prosecuted. The Court say further, "the regular mode of reviving a suit against the heirs of a defendant, dying during its pendency, we have already seen, is by bill of *revivor*." In *Shields v. Craig*, 6 Monroe's Rep. 373, it was held, that where the complainant dies, the suit can only be revived by bill; and in *Holdes v. Mount*, 2 J. J. Marshall's Rep. 182, it is said, that it must be revived by a bill of *revivor*, and not by an order of Court. [Story's Eq. Plead. 289; and *Bowie v. Minter et al.* at this term.]

In the case before us, the order of Court, without giving leave to file a bill of revivor, directs, "that the cause stand revived," &c. This, it is insisted, is a mere irregularity; and was cured by the failure to object to it, while the suit was pending below. There can be no question, that defective notices and irregularities in practice, are waived, if the parties appear, and proceed with the cause, without objection. [Dunn v. Tillotson, 9 Porter's Rep. 272.] Let it then be conceded, that the order, which declares that the suit is revived in the name of the complainant's executrix, is an irregularity which may be waived; yet the record furnishes no *data* from which a waiver may be inferred. Neither Brown nor Cullum appeared below—their non-appearance is expressly stated, and a decree *pro confesso* rendered against them.

The vitality of the cause having been suspended by the death of the complainant, and not being regularly revived, no decree could be rendered, affecting the interest of the defendants.

2. True, the record, at the time of rendering the decree, did not show that publication of the order, as to Brown, had been duly made; yet, since the writ of error was sued out, it has, in this particular, been perfected, *nunc pro tunc*. The proof was doubtless made to the Court before the decree *pro confesso* was rendered; but its entry upon the record was then omitted; and the Court, in allowing the amendment, only permitted that to be done, which there was a sufficient warrant for doing at the proper time.

Publication is the mode pointed out by statute, for bringing a non-resident defendant, in a suit in chancery, before the Court, where a subpœna cannot be served on him personally, or he declines to appear of his own accord. It is but a substitute for process; and where it is proper to be made, is quite as efficient in authorizing the action of the Court.

In *Hefflin v. McMinn*, 2 Stewart's Rep. 492; and in subsequent cases, this Court has considered that it was permissible for a sheriff to amend his return on original process *nunc pro tunc*, not only after judgment, but even after a writ of error was sued out. And it has been holden, that, where a judgment has been rendered for too much, or too little, in conse-

quence of a clerical error, it may be amended in the Court below, notwithstanding error brought; and the amended judgment will be affirmed, without damages, at the costs of the defendant in error. [Brown & Parsons v. Tarver, Minor's Rep. 370; Evans v. St. John, 9 Porter's Rep. 186.]

The evidence of the Register, according to a rule applicable to *nunc pro tunc* entries in general, was not admissible: namely, that such an entry cannot be made, unless there be something of record to authorize it. But that rule has not been applied, where the object of the amendment is to show that process was served. Now, the publication being intended as a substitute for the personal service of process, and designed to bring the defendant before the Court, that the cause may progress to a hearing, by analogy, it would seem to be competent, even after decree, to show to the Court, that publication was regularly made.

3. In respect to the third ground of error relied on, it is unnecessary to inquire whether, where a bill is amended before answer, and after subpœna served, new process should issue to the defendant to answer the amendments. For, though leave was given to the complainant's executrix to amend the bill, "by adding an additional defendant," yet, in point of fact, no amendment was ever made.

4. Gascoigne, though a proper, was not an indispensable, party to the bill. It was competent for the complainant, to have proceeded against the mortgagors, without joining, as a defendant, either a prior, or subsequent, incumbrancer. The rights of the former are paramount, and those of the latter will not be concluded, *unless he is made a party*. The head note to Judson v. Emanuel et al, 1 Ala, Rep. N. S. 598, would indicate a different decision; but, in the case itself, the law is laid down as we have stated it.

The law upon this subject, is examined by Mr. Justice Story, with his usual research, Eq. Plead. 177, *et post*; and he intimates an opinion in accordance with Mr. Calvert, that, though not absolutely necessary, the safe course is to make all subsequent incumbrancers, of whom the plaintiff has knowledge, parties; and to pray that the decree may be made conclusive against them. [See Calvert on Parties in Eq. 128 to 138.]

But the question we are examining is, not whether Gascoigne was an indispensable party; it is, whether he was entitled to a decree for the foreclosure of his mortgage?

In *Harris et al. v. Carter's ad'mr. et al.*, 3 Stew. Rep. 233, the bill, among other things, prayed that the assignees of a note be enjoined from proceeding thereon by suit at law. At the hearing, a decree was rendered against the complainants, in favour of the assignees, for the amount of the note and interest. The Court thought the decree erroneous, and say, "they" (the defendants) "had exhibited no bill asking the coercion of its" (the note's) "payment; and upon their answer, they are only entitled to a decree for costs. If one, who is made a defendant in Chancery, would obtain relief against the complainant, his remedy is by cross bill; when the answer has responded to the bill, it prays that the defendant may be dismissed with his costs; and this is the only prayer which it is competent to embrace in the answer." (See Lube's Eq. Plead. 39, 103, 228, to the same effect.)

It is true, that in *Morris et al. v. Terrell*, 2 Rand. Rep. 14, the Court determined, that one of the defendants was entitled to a decree against his co-defendant. But that was a case entirely unlike the present. It was a bill filed by a principal, against his agent, and a purchaser of the principal's real estate from the agent, to set aside the purchase, upon an allegation of a breach of trust, and a fraud by the agent, to the prejudice of his principal. The sale was adjudged invalid, and consequently set aside; and a decree was directed to be rendered in favor of the purchaser (to whom no fraud was imputed) against the agent. To this point, see *Chamley v. Lord Dunsanny et al.*, 2 Sch. & Lef. Rep. 690.

The counsel for the defendant in error, has cited many cases determined by the Court of Chancery of New York, which he insists very fully sustain the decree in favor of Gascoigne. The first of these, is the case of *Renwick v. McComb et al.*, Hopkins' Rep. 277, which was a bill for the foreclosure of a mortgage, to which a subsequent incumbrancer was made a party. On taking the account before the Master, the question whether any thing, or how much was due to the subsequent incumbrancer, was a matter of litigation between the mortgagor and him-

self. The complainant asked the Court to direct the Master to report how much was due to him, as it was not contested that the cause might be then set down for hearing. *The Court* said, "the regular course is, that all incumbrances should be reported before a decree of sale. It is important to preserve this course for the interest of the defendant, who must know the amount of the incumbrances before he can redeem. It would also be inconvenient, to divide the cause into separate parts, to adjust the rights of each incumbrancer."

The other case, is the *Union Ins. Co. v. Van Rensselaer*, 4 Paige's Rep. 85; the opinion of the Court refers to the case of *Renwick v. McComb et al.*, as ascertaining the *practice* at the time it was decided; but states that "new rules" have been since adopted, which prevent the first mortgagee from being delayed by controversies between subsequent incumbrancers. These cases were, doubtless, determined under the influence of rules applicable alone to the Chancery proceedings in N. York. The case cited from Hopkins, is a very brief report; but is noted by the reporter, as a case of practice, and so treated in the subsequent decision.

The right of subsequent incumbrancers to the surplus, cannot with propriety, arise until it shall be ascertained that there is a surplus; and this cannot be known, before the mortgaged premises have been sold, and the debt of the prior incumbrancer, together with all costs fully discharged. The object of joining them as defendants with the mortgagor, is merely to conclude them as against the first mortgagee, and to secure to the purchaser under the decree of foreclosure, a title not liable to be attacked by a subsequent incumbrancer. It is not intended, by bringing the subsequent incumbrancer before the Court, to give him a decree for so much of the surplus, as may be necessary to satisfy his lien—he may, if he can, show that he is entitled to a preference over the complainant, and thus defeat him. But, if he would obtain a decree for his demand, he must become an actor in Court. It is however, needless to consider this point further, as the rules of practice recently adopted, provide so clearly for the adjustment of the claims of subsequent incumbrancers, as to leave but little room for further controversy.

5, 7. The view taken of the last question, makes it unnecessary to inquire into the sufficiency of the proof of Gascoigne's note and mortgage; or, whether the mortgage was an operative lien, as against the title of Cullum. The notes made by Brown and Cowly to Walker, and the mortgage executed as a security for their payment, are described in the bill; and it is alledged, that Walker endorsed the notes, and assigned and delivered the mortgage to the complainant for a valuable consideration. In the order, by which a reference was made to the Master to report an account, it is stated, that the "mortgage and notes" were "produced and proved to the Court;" and in the transcript, we find the copy of a mortgage, corresponding with that recited in the bill. It does not appear, from the evidence sent up, or any recital in the record, that the assignment of the notes and mortgage was made as alledged; yet, the Master reports, that, on comparing the mortgage, bill and notes, he finds due the complainant, two notes, dated 4th February, 1836," &c. If the recital in the record warrants the inference, that the notes were endorsed as alledged; then the objection, that the proof is defective, cannot avail the plaintiff in error. The statement in the reference to the Master, "that the mortgage and notes were produced and proved in open Court;" has been held to be sufficient to show, that the notes and mortgage were identical with those described in the bill. [Levert et al. v. Redwood, 9 Porter's Rep. 92.] So it has been held, that, after a decree *pro confesso*, a less amount of proof will be required to make out the complainant's case, than if the facts were contested by a plea or answer. [Wilkins & Hall v. Wilkins, 4 Porter's Rep. 245; Levert et al. v. Redwood, 9 Porter's Rep. 93.] In the present case, the decree was *pro confesso*, as to all the defendants but Gascoigne, and he did not deny; but, so far as he answered, admitted the allegations of the bill. We are then, of opinion, that the possession of the notes and mortgage by the complainants, together with the circumstances referred to, were sufficient to have authorized a decree of foreclosure.

6. It is objected to the decree of the Chancellor, that it authorizes the Master to sell the mortgaged premises "in separate lots, or in whatever manner may best comport with the

interests of the defendants ;" and thus invests him with a discretion, which he may exercise to the prejudice of the parties interested in the equity of redemption. This objection was, probably suggested by the generality of the language employed in *Walker et al. v. Hallet*, 1 Ala. N. S. 391, 2 ; a case in which, some of the defendants were infants. But in *Ticknor v. Leavens' Exr.*, at this term ; it was in effect held, that it is not in general erroneous, to confer upon the Master, the authority to sell the mortgaged premises in the manner it has been done in the case at bar, unless infants are interested ; and then a reference should be made to the Master, to report whether the interest of the infants, require a sale of the property in separate parcels, or all together ; and if a part only, then what part. Here there are no infant defendants ; and we can conceive no sufficient reason for holding, that the discretionary power given to the Master, is fatal to the decree.

In *Mussina v. Bartlett*, 8 Porter's Rep. 277, it was objected to the decree, that it did not direct a report to be made to the Court, of the sale of the mortgaged premises. But this Court thought, that the power of the Chancellor over the officer executing the decree, to correct any irregularities in his proceedings, was ample, without expressly requiring a report to be made ; and consequently overruled the objection. The fact, that a deed was directed to be made to the purchaser, before a confirmation of the sale, cannot make an order setting aside the sale, less effectual. [*Mobile Cotton Press, &c. v. Moore & Magee*, 9 Porter's Rep. 679.] Consequently, the direction to the Master to convey, is entirely unimportant. Without attempting to recapitulate, the decree, for several of the causes examined, must be reversed and the cause remanded.

WATT'S EX'RS. v. SHEPPARD.

1. In proceeding on a penal bond, the plaintiff may declare for the penalty: or, under the act of 1824, "regulating proceedings on penal bonds," he may set out the condition, either in whole, or in part, and assign one or more breaches; or, if the defendant puts in a plea, which does not tender an issue, he may assign breaches in his replication: and, where judgment is rendered for the plaintiff on demurrer, or by default, if he has not previously assigned breaches, he may suggest them on the roll.
2. If the declaration be substantially defective in the assignment of breaches, the plaintiff will not be allowed to strike them out after demurrer, on the ground, that the declaration is good without them.
3. In assigning breaches, it is sufficient to state the intention of the parties, as it may be collected from the entire instrument, without using the precise terms in which the intention is expressed.
4. A breach must be so assigned as to show, that the contract has been broken, and that the plaintiff has a cause of action.
5. It is not necessary, that the breach assigned, should negative the performance of the defendant's contract *in toto*; if it has been performed in part, it is enough to aver a non-performance as to the residue.
6. Where several breaches are assigned if the defendant demurs to the whole, if one be good, the declaration will not be held ill; the correct practice is, to demur to the breaches severally, or only to such as are defective.
7. In the assignment of breaches, the plaintiff should not go beyond the defendant's contract, so as to make it uncertain, whether it has been broken; yet surplusage furnishes no ground of demurrer.
8. The first general principle in the construction of contracts, is, if possible, to carry into effect the intention of the parties. To do this, the *subject matter* of the contract, the *situation* of the parties, the *motives* that led to it, and the *object* to be attained by it, are all to be looked to.
9. Such a construction shall, if practicable, be placed upon a contract, as will make every clause operative.
10. Where no time is designated, within which an act is to be done, the law requires it shall be performed in a reasonable time. What is a reasonable time, is a question of fact, depending upon the situation of the subject of the contract, &c., as known to the parties, &c.
11. Where the damages resulting, from the non-performance of a contract, are uncertain, and cannot be admeasured with any degree of accuracy, there the sum agreed to be paid by the party in default, will be regarded as liquidated damages.
12. Where articles covenant for the performance of several things, and stipulate for the payment of a sum in gross, in the event of a breach, the sum expressed will be regarded a penalty; and, if the parties would stipulate the damages in such a case, they should express the sum to be paid, upon each distinct breach.
13. Where a large sum is agreed to be paid, upon the non-payment of a smaller

sum, or the non-performance of a duty, the damages resulting from which may be ascertained with reasonable certainty, and which is much less than the sum expressed, that sum will be a penalty.

14. Where a party stipulates to perform work by a definite time, and upon default, to pay so much weekly or monthly, if the sum is not so unreasonably large, as to induce the belief, that the parties never contemplated its payment, it will be considered as liquidated damages.
15. Where the damages resulting from a breach of contract are certain, and the sum expressed in one event, would be too small, and in another too large, it cannot be considered liquidated damages.
16. The terms "penal sum"—"liquidated damages," &c., are not conclusive, to show the true character of the sum agreed to be paid in the event of non-performance of a contract.
17. It is permissible to show by proof, the value of property agreed to be conveyed, or delivered; and the consideration moving from the other party therefor, as criteria by which to ascertain, whether a sum agreed to be paid upon default, is a penalty, or liquidated damages.
18. The recital in a contract that, in consequence of the *difficulty* of ascertaining the injury which would result from a non-performance, the parties agree upon a sum as *stipulated damages*, is no evidence of the *difficulty*, &c.; yet it shows, that the parties intended to liquidate the damages by contract; and, if the sum agreed is a reasonable compensation, it is proper that the intention of the parties should be carried in effect.
19. A party undertook to make a title to a large tract of land, and upon a failure to comply with his contract, either in whole or in part, agreed to pay to the obligee, the sum of ten thousand dollars, as stipulated damages. This sum was about the value of the entire tract, at the time the contract was entered into; the obligee received a title for part of the land, and sought to recover the sum stipulated, for failing to perfect title to the residue—Held, that the obligee might have refused a title to a part, until it was completed to all; but having received it, he could not recover as for an entire breach—if ten thousand dollars was a fair estimate for a failure to convey all the land, it was too much for a part.
20. Where a party undertakes to convey a large tract of land, and upon default, either in whole or in part, agrees to pay a certain sum, as "stipulated damages," if he conveys a part, the measure of damages which the obligee is entitled to recover, is the value of the land not conveyed, estimating the *entire tract* at the *sum stipulated*.
21. S. held the obligation of W. to make him a title to a tract of land, and before title was made to the obligee, the obligee sold the land to C., and brought an action against W. on his obligation—Held, that C.'s declaring himself satisfied with the title which he had, did not bar the action by S. against W.

THIS was an action of debt, brought by the defendant in error against the plaintiff's testator, in the Circuit Court of Dallas. The writing declared on, appears of record, and is as follows: "We, Nancy Wade, Thomas Watts, Buddy Bohannon, Henderson S. Wade, John L. Moody, Young Bohannon, Hud-

son Wade, Memory J. M. Bohannon, Robert E. Bohannon, Young F. Bohannon, and Wiley J. Underwood, acknowledge ourselves, held and firmly bound unto Abraham Sheppard in the sum of fifty thousand dollars, for the payment of which to said Sheppard, his heirs, representatives and assigns, we bind ourselves, each and every of us, our, and each and every of our heirs and representatives; witness our hands and seals, this 23d day of December, A. D. 1834. The above obligation is entered into, for the purpose of securing to said Sheppard, his heirs, &c. a performance of the conditions and stipulations following to wit: the said Sheppard claims title, by purchase from James Wade, deceased, to a certain tract of land, situated near the mouth of Cedar Creek, and below the same, in Dallas county, and containing about three thousand acres; Sheppard also claims title to all the negroes, which were on said plantation at the death of said Wade, being about one hundred and twenty-four in number; he also claims one-half the crop, raised on said plantation the present year, to wit: the year A. D. 1834, together with all the stock, plantation tools, &c. being on said plantation. This claim is set up by Sheppard, under, and by virtue of, two instruments or deeds, executed by said Wade to said Sheppard, dated 17th March, 1834, or about, and tested by Kinchen F. McKinney and Wilis Carr. The aforesaid obligors, claiming to be interested in said property, as, and for the other heirs of said James Wade, propose to obtain from said Sheppard, a rescission of the contract under which he claims; and a surrender to them, for all the right heirs of said James Wade, of all the interest of said Sheppard, in the aforesaid lands, negroes and other property; and as the consideration to said Sheppard, for his rescission of said contract made with said Wade; and his, the said Sheppard's surrender and release to said obligors, of all his interest in the aforesaid lands, negroes and other property, claimed by him under said contract, with said James Wade, all which rescission, surrender and release. the said Sheppard, has done and executed by deed: we, the above named obligors have agreed, and do hereby agree to convey, or cause to be conveyed, by good and effectual titles, in fee simple, to the said Sheppard, his heirs, representatives, or assigns, the following described lands,

situated in Dallas county, to-wit: that portion of section sixteen, in township fourteen, and range ten, containing four hundred and forty acres, or about that, which was purchased by said James Wade in his life time; he, Sheppard paying the notes given for the purchase money by said Wade; also, fractional section seventeen, east of the Alabama river; also the North West quarter section, of section twenty-one, in township fourteen, and range ten. We also agree to deliver, or cause to be delivered to him, said Sheppard, the one half of the cotton crop raised on the plantation above described, as near the mouth of Cedar Creek, this present year to-wit: A. D. 1834; also one entire crib of corn, now being on said plantation, and which is to be such one as may be chosen by said Sheppard; also, twelve stacks of fodder; also, a reasonable portion of the present crop of potatoes; all which property is now on said plantation; one half of the cotton, now ginned and packed, to be delivered to said Sheppard as soon as is convenient; and the balance to be divided as it is ginned and packed, not waiting till the whole shall be ginned and packed; or as soon as convenient, after a portion is ginned and packed—the whole to be delivered by the first day of April, A. D. 1835, and so of the other personal property. This forms the consideration stipulated to said Sheppard for his rescission, surrender and release as aforesaid; and in as much as it would be difficult to determine the injury or loss, which would accrue to said Sheppard, from a non-compliance on our part, the parties agree on the following as stipulated damages in the cases mentioned, to-wit: on failure to convey or cause to be conveyed in the manner stated, the land described, or any part thereof, the stipulated damages to be ten thousand dollars: on failure to deliver or cause to be delivered to said Sheppard, the above mentioned personal property, or any part, by the time stated, we agree to pay Sheppard as stipulated damages, the sum of fifteen thousand dollars. We covenant with Sheppard, that he may take possession of the land intended to be conveyed to him, as above stated, as soon as he may think fit, and that he may retain possession thereof, and cultivate the same; and we guarantee to him continued possession thereof. If he should be turned out of possession by suit, by any one holding title, we agree to pay

him stipulated damages, the sum of ten thousand dollars. Those, who may at any time sign the obligation, covenant that all those named in the commencement of this obligation, shall, as soon as convenient execute the same, which shall not extend beyond one year, or shall convey to said Sheppard their interest in said property.

We covenant, that Sheppard shall have the titles perfected to him in one year; and if any legal steps should, become necessary to obtain perfect titles to said land, we covenant with Sheppard, that such legal steps shall be effectual in obtaining such titles; otherwise, we are to pay the stipulated damages of ten thousand dollars, first above agreed on. In the deed from the said James Wade to the said Sheppard, the latter stipulates not to sell, or convey any property mentioned in said deed, during the twenty years, within which said contract was to be performed on the part of Sheppard. Now, we covenant to save harmless the said Sheppard against the operation of said provision, so far as the making the surrender and transfer herein mentioned, may be considered a breach of said stipulation. The liquidated damages mentioned, are not to prevent general damages, for any other breach not alluded to. We bind our heirs and representatives, jointly and severally, for the fulfilment of all the covenants and stipulations of this deed. If all the stipulations, covenants and conditions of the above agreement are complied with, the above obligations to be void, otherwise to be in force. The title deeds of the heirs, are to be obtained and handed to Sheppard by the obligors."

The declaration in its commencement, claims fifty thousand dollars as the debt, and assigns five distinct breaches. The first alledges, that titles to a part of the land, agreed to be conveyed by the obligors to the plaintiff below, have not been perfected; though they had stipulated to convey the same, in twelve months from the time of the execution of their obligation. The part of the land, to which titles had been completed, was "the fractional section, seventeen, east of Alabama river, and the north west quarter, of section twenty-one, in township fourteen, and range ten. The second breach, alleges the expenditure by the plaintiff below, of one hundred dollars, in endeavoring to perfect his title. The third breach, avers a failure to

convey to the plaintiff by the obligors, the lands described in the first breach, according to the terms of their obligation. The fourth breach avers, that some of the obligors, particularly named, have failed to convey to the plaintiff, their interest as tenants in common, in the lands designated in the third breach. The fifth breach avers, that neither all, nor any of the obligors, and particularly three, who are named therein, have made effectual conveyances in fee simple to the plaintiff, to the part of the lands described as above. All the breaches except the second, deduce, as a consequence of the failure to convey, a liability to pay ten thousand dollars, as liquidated damages.

The declaration in conclusion, alleges that by reason of the several breaches, the writing obligatory became forfeited, and an action accrued to have, and demand the sum of fifty thousand dollars, &c. The non-payment of which sum, or any part thereof, is averred, to the plaintiff's damage, twenty thousand dollars.

The defendants demurred to the declaration, and their demurrer being overruled, they pleaded—1. *Nil debet*. 2. A performance of the several stipulations contained in the writing obligatory, a breach of which, was alledged. 3. A performance of these stipulations, so far as it was practicable. To the first and third pleas, the plaintiff demurred; and on the second, issue was joined; the demurrer was sustained, and the case submitted to a jury, who returned a verdict in favor of the plaintiff, for ten thousand dollars damages.

On the trial, the defendant below excepted to the ruling of the presiding judge. From the bill of exceptions, it appears, among other things, that the plaintiff was in possession of the lands, to which the obligors had agreed to make titles, at the time the writing obligatory was executed; and had occupied the same by himself and his vendee ever since, without molestation. No actual damages were shown to have been sustained by the plaintiff; though it was proved that several of the heirs of James Wade, deceased, had not conveyed their interest in the lands to which it was alledged, that titles had not been perfected; and the vendee also declared on the trial, that he was satisfied with the title received from the plaintiff below. The Court charged the jury that, as the defendant and his co-obli-

gors had stipulated the sum of ten thousand dollars as damages, in the event of a failure to complete the plaintiff's title, to the lands agreed to be conveyed; they should regard that sum as a criterion, by which to determine the extent of the defendant's liability, if the plaintiff had made out his case by proof. And that, if any title to the land, or any part of it, remained in any of the heirs of Wade, the defendant was bound to pay the sum of ten thousand dollars, as the damages fixed and agreed by the parties.

Judgment being rendered against the defendant's testator, he prosecuted a writ of error to this Court; which has been revived in the name of his executors.

HOPKINS and THORNTON, for the plaintiffs in error.

EDWARDS and CAMPBELL, for the defendant.

COLLIER, C. J.—The arguments at the bar, make it necessary for us to consider these questions—

1st. Did the Circuit Court err in overruling the demurrer to the declaration?

2nd. Is the charge of the Court to the jury, authorized by the contract of the parties?

First—The act of 1824, "regulating proceedings on penal bonds," Aik. Dig. 273, is substantially a transcript of the statute; 8 and 9, Wm. 3, Ch. 11, Sec. 8; and enacts that, "in all actions in any Court of record, upon any bond, or on any penal sum, for non-performance of any covenants or agreements, contained in any indenture, deed, or writing, the plaintiff or plaintiffs may assign as many breaches as he or they may think fit" &c. In proceeding under this act, by analogy to the practice which has grown up under the English statute, the plaintiff, at his election declares for the penalty, without noticing the condition, or sets out the condition, either in whole, or in part, and assigns one or more breaches; if he does not assign them in the declaration, he may assign them in his replication, if the defendant puts in a plea, which does not tender an issue. Where a judgment is rendered for the plaintiff, upon demurrer, or by default, if he has not previously assigned breaches, he may suggest upon the roll (as it is termed in law parlance) the breaches

for which he seeks to recover satisfaction. The mode in which the plaintiff is to declare, reply, or make suggestions, upon the roll, is clearly pointed out by the learned annotator upon Saunders. (See notes to Gainsford v. Griffith, 1 Saund. Rep. 58; and notes to Robert v. Mariett, 2 Saund. Rep. 187, part 11.)

In the case before us, the plaintiff has elected to assign the breaches, for which he seeks to recover in his declaration; and the question is, whether they are so stated, as to show upon the record a good cause of action. If, in this respect, the declaration be substantially defective, after demurrer, the plaintiff will not be permitted to strike out the assignment of breaches, on the ground, that the declaration is good without it. (Dixon v. The United States, 1 Brockenb Rep. 177.)

In assigning breaches, it is not necessary to use the precise terms of the covenant or agreement sued on; but it is sufficient to state the intention of the parties, as it may be collected from the instrument itself. (Bustor's Ex'r. v. Wallace, 4 Hen. & Munf. Rep. 82; Day, et al. v. Chism, 10 Wheat. Rep. 449; Bristock v. Stanton, 1 Ld. Raym. Rep. 106; Alebury v. Walby, 1 Stra. Rep. 229; Smith v. Sharp, 5 Mod. Rep. 133; Thorncroft v. Barnes, 10 Mod. Rep. 150.) But a defective statement of a breach, so that thereby the contract does not appear to have been broken, would be bad on demurrer; and even after verdict. (Lunn v. Payne, 6 Taunt. Rep. 140; Siclemore v. Thistleton, 6, M & S. 9.) Enough must be placed on the record to show that the contract has been broken; and that the plaintiff has a cause of action. (Breckenridge v. Lee, 3 Bibb's Rep. 330; Hord v. Trimble, 3 Marsh. Rep. 533.) A mere informal allegation however, if there be sufficient matter to show a breach, would not be a fatal objection on general demurrer. (Charnley v. Winstanley, 5 East Rep. 270; Perrean v. Bevan, 5 B. & C. Rep. 284.)

It is not necessary, that the breach assigned, should negative the performance of the defendant's contract in every particular; if it has been performed in part, it is enough to aver a non-performance as to the residue. Thus in Dale v. Roosevelt, 9 Cow. Rep. 308, the plaintiff declared on a covenant, to pay *forty-four hundred dollars* in cash; and alledged that the defendant had not paid *four thousand dollars*; the breach was

held to be well assigned ; the Court considered that the declaration merely limited the damages to the amount unpaid.

Where several breaches are assigned, if one be good, the defendant cannot demur to the whole; and, if he does, the declaration cannot be held ill ; the correct practice, is to demur to the breaches severally, or, only to such as are defective. [Duffield v. Scott, 3 T.'s Rep. 374 ; Samuel v. Judin,, 6 East. Rep. 333; Powdick v. Lyon, 11 East. Rep. 565 ; Orton v. Butler, 5 Bar. & Ald. Rep. 652 ; McCoy v. Hill, 2 Litt. Rep. 374 ; 1 Saund. Rep., note 9, 285, 6.

Although in assigning a breach, the plaintiff should not alledge it to be more extensive, than the defendant's contract, so as to make it uncertain, whether the contract has been broken. [Com. Dig. Pleader, C. 47; Spires v. Parker, 1 T. Rep. 144.] Yet, surplusage furnishes no ground of demurrer, the maxim being *utile per inutile non vitiatur*. [Stephens' Pl. 422, *et post*.

It remains for us to apply the principles laid down, to the declaration in the case at bar. The plaintiff has made his declaration unnecessarily prolix, by embodying *in extenso*, the bond of the testator, with all the stipulations contained in the condition ; as also, by the number of breaches assigned, and the unusual length of each assignment. This mode of declaring was doubtless, adopted *ex majore cautela*, and furnishes in itself no ground of demurrer.

Without undertaking to inquire, whether all the breaches assigned, do not alledge a violation of the defendant's contract ; we think it entirely clear, that the first and third negative a performance. We have seen, that the plaintiff need not declare for an entire breach ; but he is entitled to recover damages for such part of the contract, as is unperformed. Thus, in the present case, if a conveyance has been made and accepted, to a part of the land agreed to be conveyed to the plaintiff, he may sue and recover for a failure to make title to the residue.

It was argued for the plaintiff, that the first and third breaches are not well assigned ; because they insist upon the plaintiff's right to recover ten thousand dollars, stipulated damages, as a consequence of the non-performance of the acts

alleged. These assignments, after stating the failure to make title, the first within *twelve months*, and the third *generally*, then deduce the liability to pay the ten thousand dollars. These deductions must be regarded as surplusage, and cannot affect the assignments, which are full and complete, without them—the excessive statement may be stricken out, or disregarded.

There being several good assignments, it is immaterial, whether the others were demurable; the demurrer being to the entire declaration could not have been sustained. The correct practice, we have seen, is to demur severally to the breaches. This view disposes of the objections to the declarations, and it follow, that the demurrer was properly overruled.

Second: The question arising upon the instruction of the Judge, is, does the contract of the parties liquidate the damages, which the obligors should pay, in the event of a failure to make title to the lands, agreed to be conveyed to the plaintiff below? In order to the solution of this question, we must consider what acts they agreed to perform, and what principles are to guide us in distinguishing between a penalty and liquidated damages. The first branch of this inquiry, leads us to examine into the contract of the parties, and to determine what are the obligations it enjoins.

The first general principle in the construction of all contracts, is, that they shall be so expounded, as to carry into effect the intention of the parties. To this end, the Court should, if necessary, look to the *subject matter* of the contract, the *situation* of the parties, the *motives* that led to it, and the *object* intended to be attained by it. [Hollingsworth v. Fry, 4 Dall. Rep. 345; Hopkins v. Young, 11 Mass. Rep. 302; Howland v. Leach, 11 Pick. Rep. 154; Davis v. Barney, 2 Gill & Johns, Rep. 382.] The intention is not to be collected from a single clause in a writing, but from the entire context; and it is immaterial in what part of a deed, any particular stipulation may be inserted; for the exposition must be, upon the whole instrument, *ex antecedentibus, et consequentibus*, and according to the reasonable sense and construction of the words. All latitude of construction must submit to the restriction, that the

language of the instrument will bear the sense sought to be put upon it. [Chitty on Con. 4, Am. ed. 62 to 75; Platt on Covenants, 136, *et post*, 3 vol. L Lib.]

Again: Such an exposition shall be made of a deed, if practicable, as will give efficiency to every clause. And when no time is designated, within which an act shall be done, the law requires, that it shall be performed in a reasonable time. [Platt on Cov. 145.]

The agreement of the parties in the case before us, so far as it is material to notice it, may be thus succinctly stated. The plaintiff below, claimed to be the purchaser from James Wade, deceased, of a large tract of land, and a great number slaves; and also, of one half of the crop produced on the land in the year 1834, together with stock, plantation tools, &c; which claim was evidenced by two written instruments, executed by the decedent in his lifetime. Thomas Watts and his co-obligors being interested in the estate of Wade, and desirous of obtaining from Sheppard a relinquishment of the claim, set up under his purchase, entered into a contract with him; by which they stipulated, that, in consideration, that he had released and rescinded the contract made between Wade and himself, they would convey, or cause to be conveyed to him, by good and effectual titles, in fee simple, several tracts of land particularly designated. The obligors stipulate further, that they would deliver, or cause to be delivered to Sheppard, one half the cotton crop, &c. by the first of April, 1835. And, as it would be difficult to estimate the damages, which Sheppard would sustain by the non-compliance on the part of the obligors, "the parties agree on the following, as stipulated damages, in the cases mentioned, to wit: on failure to convey, or cause to be conveyed in the manner stated, the land described, or any part thereof, the stipulated damages, to be ten thousand dollars." In respect to the personal property, the obligors stipulate to pay fifteen thousand dollars damages, should they fail to deliver all, or any part thereof, at the time appointed.

The obligors agree, that Sheppard may take possession of the lands to be conveyed to him, and may retain possession of, and cultivate the same; and, if ejected by suit, they stipulate

to pay him ten thousand dollars as damages. In the contract, it is recited, that others are interested with the obligors in the estate of Wade; and it is therefore covenanted, that all who are "named in the commencement of the obligation," shall, within one year, execute the same, or convey their interest in the property described, to Sheppard.

The obligors further covenant, that Sheppard shall have the titles perfected to him in one year; and, if legal steps should become necessary to perfect title to the land to be conveyed, they covenant, that such steps shall be affectual, "otherwise they covenant to pay ten thousand dollars, the stipulated damages first above agreed on."

It is also agreed, that "the liquidated damages mentioned, are not to prevent general damages for any other breach not alluded to." The agreement contains other stipulations; but as they can have no influence in determining the construction of the covenants to make title to the land, it is not necessary to notice them.

The object to be effected by the obligors, was the rescission of the contract between Wade and Sheppard; and, as an inducement to the latter to meet their wishes, they undertake to convey to him title to several tracts of land, and to deliver to him certain personal property. The record informs us, that the title to the lands to be conveyed, was in the heirs of Wade; that these heirs were numerous; and that some of them were *femes covert*, and others infants. Such being the character of the persons whose title was to be transferred to the obligee, a resort to "legal steps" must have been anticipated, as the only effectual means of divesting the interest of the infants. The time required to effect this purpose, was altogether uncertain, but, in all probability, much more than twelve months.

Under these circumstances, it cannot be supposed, if the language employed will admit of any other reasonable interpretation, that the obligors intended to stipulate for the payment of ten thousand dollars as damages, if they failed to perfect title to the obligee in one year. Had such have been the contract of the parties, it was most easy and natural to have expressed

it, as a part of the *first* covenant to convey, instead of agreeing to convey generally.

If the title was to have been perfected in one year, or, in the event of a failure, damages, equivalent in value, and in lieu of the title, were to be paid, where was the necessity of stipulating, that all whose names were recited in the obligation, should execute the same, or convey their interest in the lands in one year. The obligation became operative *eo instanti*, upon those executing it; and its execution by others, would not absolve them from the force of the covenant to convey within a definite period. And, if liquidated damages were paid for the failure to complete title within that time, the covenant to cause the obligation to be executed, would become, *ipso facto*, discharged.

The undertaking to pay liquidated damages, is not annexed to the covenant to perfect titles in one year. But the obligors "covenant to pay ten thousand dollars, the stipulated damages, first above agreed on," if "legal steps" shall prove ineffectual to complete title. By the "damages first above agreed on," we are to understand the obligors to mean, such as are annexed to the covenant to convey generally. We might, it is true, if the *subject matter* of the contract, the *situation* of the parties, and the circumstances under which it was made, require it, refer back the agreement to pay damages, to the covenant to convey within one year. But there is nothing in the terms used to make such a construction imperative; and it is unreasonable, as already shown, to suppose the parties intended thus to stipulate.

The covenant to perfect title within one year, if broken, subjected the obligor to the payment of nominal damages certainly; and to such further damages as the obligee might sustain. Little injury would usually result to the obligee, for the want of a prompt compliance with such a covenant; and it might, perhaps, have been assented to, without an apprehension of serious consequences. But the case would be greatly changed, if a definite sum in damages had been stipulated, as the consequence of a breach—that sum would be recoverable, without reference to the injury done the obligee.

The covenants to convey titles generally, did not bind the obligors to a performance in any definite period; but, as we have already said, it required title to be made in a *reasonable time*. What would be a *reasonable time*, is a question of fact, depending upon the situation of the title, as known to the parties, &c. The obligors and obligees seem to have looked forward to a resort to "legal measures" as probable, in order to have enabled the former to make titles. If it were necessary to ask the aid of a Court, a *reasonable time* should be allowed to commence and prosecute the suit to a close. The parties considered the ineffectual prosecution of a suit by the obligors, as tantamount to a failure to make title in a *reasonable time*; for, it is stipulated that, in that event, the ten thousand dollars shall be paid. If the damages are to be regarded as liquidated, these covenants are, in some sense, equivalent; for the obligee could not recover the damages for the breach of each; but a recovery for the failure to make title, would bar a suit for a breach resulting from the ineffectual prosecution of a suit.

The obligors bind themselves to a performance of their contract, under a penalty of fifty thousand dollars; and agree, that "the liquidated damages mentioned, are not to prevent general damages for any other breach not alluded to." This clause is not well expressed; but the obvious meaning of the parties is, that the obligors shall be liable to pay the obligee such damages as he may sustain for the breach of those covenants, for which damages are not stipulated. There is a clear indication, that the parties themselves did not suppose, that they had agreed upon the loss which the obligee would sustain by each breach of the obligors' contract; and that the parties were not mistaken in this particular, we think has been sufficiently shewn.

It is exceedingly difficult, if not impracticable, to educe from the adjudged cases, any general principles, by which it may be determined, in all cases, whether a sum annexed to a contract, is to be regarded as a penalty, or liquidated damages. Mr. Dane, after stating many cases upon the point, concludes, that if there be any such principle, it is this: "That

whenever one agrees to perform services, &c., and if he fail, to forfeit such a sum, this sum is the measure of damages, whenever it may be inferred the parties so intended it, or whenever it is the best rule in the case, from the uncertainty in applying any other, for want of a measure of damages." Comyn, in his treatise on contracts, (2 vol. 537,) lays down certain rules upon this subject, deduced from some of the leading English cases, decided previous to the time that he wrote. But, as we shall notice these cases, it is unnecessary to state the rules which he extracts from them. Chitty, in his work upon the same subject, (4 Am. ed. 676,) says, "It may be safely remarked, that the Courts have shown an inclination to view, if possible, the sum reserved, as in the nature of a penalty, rather than as stipulated damages." And declaring the difficulty, often experienced, of distinguishing between a penalty and stipulated damages, without stating any general principles, he notices such of the English decisions "upon this matter, as furnish rules by which the intention of the parties may be ascertained."

It has been held, that where a lessee covenants, that in case any part of the ancient meadow or pasture ground, should be converted into tillage, he would pay the further yearly rent or sum of £5, for every acre so to be broke up or converted into tillage, the increased rent is not to be considered as a penalty, but as a satisfaction, liquidated by the agreement of the parties. [Rolfe v. Peterson, 2 Bro. P. C. 436; Ponsonby v. Adams, ibid. 431.] So where a man promised a woman, that he would not marry with any person besides herself; if he did, he promised to pay to her one thousand pounds, within three months after he should marry any body else. Ten years thereafter, the man married another woman. An action of covenant was brought upon the instrument. Upon the trial at *nisi prius*, the Court directed the jury to return a verdict for the plaintiff, for one thousand pounds, if they thought the deed to be good. The jury having found for the plaintiff, the defendant moved for a new trial, with liberty also to move afterwards in arrest of judgment. The King's Bench held, that the damages were liquidated by the deed—that one thousand pounds was the true and proper *quantum* of damages; the motion for a new

trial was, therefore, overruled. But the judgment was arrested, upon the ground that the deed was invalid. [*Lowe v. Peers*, 4 Burr. Rep. 225.] And, in *Fletcher v. Dyche*, 2 Term. Rep. 32, the contract sued on, was an agreement by the defendant to pay the plaintiff a sum certain, for repairs to be done by him on a parish church. The defendant pleaded a set off for forty pounds; and alledged, that the plaintiff stipulated to complete the repairs by a certain day; and agreed that he would forfeit, and pay to him, the sum of ten pounds for every week after the expiration of that time until the work was completed. The plea further alledged, that the plaintiff did not, within the time agreed, perform the work; but permitted the same to remain unfinished for the space of four weeks thereafter. To this plea, there was a demurrer; and it was insisted for the plaintiff, that the weekly payments were in the nature of a penalty, and could not be set off; but the Court held, that these payments were in the nature of liquidated damages, and might be set off.

Astley v. Weldon, 2 Bos. & Pul. Rep. 346, is a leading case upon this head. In that case, it appears that the parties had entered into an agreement, by which the defendant agreed to perform at the plaintiff's theatre for a term of years; and the plaintiff agreed to pay a weekly salary, and the defendant's travelling expenses; and the defendant agreed to attend rehearsals, and to pay such fines as should be inflicted, for non-observance of the regulations of the theatre, &c.: "and, lastly, it was thereby agreed by the parties, that either of them neglecting to perform their agreement, according to the tenor and effect, and true intent and meaning thereof, should pay to the other of them the full sum of two hundred pounds," &c. The Court held, that the sum mentioned in the agreement, was in the nature of a penalty, and not liquidated damages. And Mr. Justice Heath said, "It is very difficult to lay down any general principle in cases of this kind; but I think there is one which may be safely stated. Where articles contain covenants for the performance of several things, and then one large sum is stated at the end, to be paid upon breach of performance, that must be considered as a penalty. But where it is

agreed, that if a party do such a particular thing, such a sum shall be paid by him, there the sum stated, may be treated as liquidated damages." So, in *Davies v. Penton*, 6 Barnw. & Cresw. Rep. 216; one party agreed with the other to sell to him the stock and the good will of his business, and to demise to him his house in which the business was carried on, for which the purchaser was to pay eight hundred pounds, and to take furniture and fixtures at a valuation. They were afterwards valued at one hundred seventy-four pounds; four hundred pounds were paid to the seller at the time of executing the agreement; and the purchaser agreed to accept and pay two bills of exchange, one for four hundred pounds, payable twelve months after date, the other for one hundred and seventy-four pounds, payable two months after date; and the seller agreed not to carry on the business within five miles of the house. And, for the true performance of this agreement, each of them did thereby bind and oblige himself to the other of them, *in the penal sum of five hundred pounds*, to be recoverable for breach of the said agreement, in a Court of law, as, and by way of liquidated damages. It was held, that this sum was a penalty, and not liquidated damages. The Court laid no stress upon the terms, "penal sum," and "liquidated damages;" but attained a conclusion by a reference to the intention of the parties, as gathered from all the parts of the contract. The Court thought it could not have been intended to fix the sum of five hundred pounds as a *maximum*, if nothing was paid upon either of the bills; for the undertaking was to pay five hundred and seventy-four pounds, the amount of both. On the other hand, if the four hundred pound bill had been paid, and that for one hundred and seventy-four pounds alone remained unpaid, the five hundred pounds would much exceed a fair compensation for that breach of the agreement.

The case of *Kemble v. Farren*, 6 Bing. Rep. 141, perhaps goes farther than any other towards settling the law on this perplexed subject. That was an action of *assumpsit*, to recover liquidated damages for the violation of an agreement, by which the defendant had engaged himself to act as princi-

pal comedian at Covent Garden Theatre, for four seasons, commencing, &c.; and, in all things, to conform to the regulations of the theatre. The plaintiff agreed to pay the defendant three pounds six shillings and eight pence every night, on which the theatre should be open for theatrical performances, during the ensuing four seasons; and that the defendant should be allowed one benefit night during each season, &c. The agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the same, *or any part thereof, or any stipulation therein contained*, such party should pay to the other, the sum of one thousand pounds; to which sum, it was thereby agreed, that the damages sustained by any such omission, neglect, or refusal, should amount; and which was thereby declared by the parties *to be liquidated and ascertained damages, and not a penalty, or penal sum, or in the nature thereof*. The breach alledged was, that the defendant refused to act during the second season. Tindal, Chief Justice, in delivering the opinion of the Court, said: "It is, undoubtedly, difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring, not only affirmatively, that the sum of one thousand pounds should be taken as liquidated damages; but negatively, also, that it should not be considered as a penalty, or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at one thousand pounds. For we see nothing illegal, or unreasonable, in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. But, in the present case, the clause is not so confined—it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of three pounds six shillings and six pence per day; or, on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended, that the clause in question, in either case, would have given the stipulated damages of one thousand pounds. But that a very large sum should become im-

mediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which Courts of equity have always relieved, and against which Courts of law have, in modern times, endeavored to relieve, by directing juries to assess the real damages sustained by the breach of the agreement."

The cases of *Astley v. Weldon*, and *Kemble v. Farren*, have been often recognized by the American Courts. In *Dakin v. Williams*, 17 Wend. Rep. 447, it appeared, that the plaintiff gave three thousand dollars for the patronage and good will of a newspaper establishment, and five hundred dollars for the type and printing apparatus; and the defendants (the vendors) covenanted, that they would not publish, or aid, or assist in the publishing of a rival paper and fixed the measure of damages, at three thousand dollars. The defendant having committed a breach of his agreement, the Court held, that the case, from its peculiar nature, and the uncertainty of arriving at a correct conclusion as to the amount of damages, was a proper one for the application of the rule, that the sum agreed upon, should be regarded as *stipulated damages*, and not penalty. In *Dennis v. Cummins*, 3 Johns. cases 297, the plaintiff brought an action of debt, for two thousand dollars, founded on an agreement between the parties for an exchange of lands. The agreement, after mentioning the terms of the exchange, contained the following covenant. And it is further covenanted in, and by the said agreement, by and between the said parties, that in case of failure to fulfil the aforesaid agreement or covenant, on the part of either of the said parties, that the party not fulfilling the said agreement, shall forfeit and pay to the other party, who shall fulfil the said agreement, the sum of two thousand dollars damages." It was decided by the Court, that the sum sought to be recovered was a penalty, and not liquidated damages—the intention of the parties, as inferable from the entire instrument clearly indicated this. The full value of the defendant's property, which was to be exchanged, was only three thousand seven hundred and fifty dollars, and the value of the plaintiffs, considerably less; hence, it was thought to be a strange construction, to suppose that the damages, on a

failure in fulfilling such a bargain, should be two thousand dollars. But the Court said. "It is true that, where it is clearly inferable from the *nature* and *terms* of the contract, that the parties have estimated and liquidated the damages, and have inserted that sum, as the amount to be paid, in case of non-performance, the Court would be bound so to consider it. The cases, however, in the books, where penalties have been considered in the nature of liquidated damages, are, either where it appears from the contract, that the penalties have barely exceeded the damages sustained, or where, from the nature and circumstances of the case, no rule for estimating the actual damages could be adopted, or it was manifestly the intention of the parties, that the sum inserted should be considered as a *compensation*, and not as a penalty." [See further upon this subject, *Bright v. Rowland*, 3 Howard's Rep. 398; *Perkins et al. v. Lyman*, 11 Mass. Rep. 76; *Gray v. Crosby*, 18 Johns. Rep. 219; *Nobles v. Bates*, 7 Cow. Rep. 307; *Hasbronck v. Tappen*, 15 Johns. Rep. 200; *Ayres v. Pease*, 12 Wend. Rep. 393; *Robeson v. Whitesides*, 16 S. & R. Rep. 320; *Abrams v. Kounts*, 4 Ham. Rep. 214; *Knapp v. Maltby*, 13 Wend. Rep. 587; *Dyee v. Dorsey*, 1 Gill & Johns. Rep. 440; *White v. Dingley*, 4 Mass. Rep. 433; *Upham v. Smith*, 7 Mass. Rep. 265; *Merrill v. Merrill*, 15 Mass. Rep. 448; *Stearns v. Barrett*, 1 Pick. Rep. 443; *Brown v. Bellows*, 4 Pick. Rep. 179; *Taylor v. Sandiford*, 7 Wheat. Rep. 14.]

In one case it was said, that no case could be found, in which the Court had adjudged a sum to be a *penalty*, where the parties had called it *liquidated* damages. [*Kerlly v. Jones*, 1 Bing. Rep. 302.] That case is not only unsupported, but is directly opposed by many others, of a later date. The designation of a sum, either as a *penalty* or *liquidated damages*, in a contract is not now considered as conclusive, to show that it should be thus regarded. See the cases cited above, and *Pierce v. Fuller*, 8 Mass. Rep. 223; 2 Story's Eq. 550; *Spencer v. Tilden*, 5 Cow. Rep., note b. 150.

So, where a party promised, by a writing (not under seal,) to deliver certain property, or pay a stipulated sum, "for value received;" it was held, that the value of the consideration, and of the property to be delivered, might be inquired into,

with a view to see, whether the sum expressed, was intended by the parties, as a penalty, or as liquidated damages; and it appearing, that the sum expressed, was much beyond the value of either, it was held, that it was in nature of a penalty; and that the plaintiff must be confined to the value of the property to be delivered, with interest, as the measure of his damages. (*Spencer v. Tilden*, 5 Cow. Rep. 144.) The fact, that the contract is evidenced by a writing, under seal, cannot exclude proof to show its true consideration, or the value of property, undertaken to be conveyed, or delivered; if the issue is such, as will tolerate the admission of the evidence, the evidence should not be rejected. (Aik. Dig. sec. 138 p. 283).

We deduce from the authorities cited, these conclusions.

1. Where the damages, which may result from the non-performance of a contract, are uncertain, and cannot be admeasured with any degree of accuracy, there, the sum agreed to be paid by the party in default, will be regarded as liquidated damages.

2. Where articles covenant for the performance of several things, and stipulate for the payment of a sum in gross, in the event of a breach; the sum expressed must be considered as a penalty. And, if the parties would stipulate the damages in such a case, they should express the sum to be paid upon each distinct breach.

3. Where a large sum is agreed to be paid, upon the non-payment of a smaller sum, or the non-performance of a duty; the damages resulting from which, may be ascertained with reasonable certainty, and which is much less than the sum expressed, that sum will be regarded as a penalty.

4. Where a party stipulates to perform work by a definite time, and upon default to pay so much weekly, or monthly; if the sum is not so unreasonably large, as to induce the belief, that the parties never contemplated its payment, it will be considered as liquidated damages.

5. Where the damages resulting from a breach of contract are certain, and the sum expressed in one event would be too small, and in another too large, it cannot be considered as liquidated damages.

6. The terms, "penal sum," liquidated damages," &c., are not conclusive to show the true character of the sum agreed to be paid, in the event of the non-performance of a covenant.

7. It is permissible to show by proof the value of property to be conveyed or delivered, and the consideration moving from the other party therefor, as criteri by which to ascertain, whether a sum agreed to be paid upon default, is a penalty or liquidated damages.

The contract in the case at bar, recites, that, inasmuch as it would be difficult to ascertain the injury to Sheppard, by a non-compliance on the part of the obligors, with their undertaking. "The parties agree on the following, as stipulated damages," &c. In this country, where the sale of lands is so frequent, there can be no difficulty in ascertaining their value; a reference to other land of equal fertility, similarly situated, furnishes a criterion, by which to estimate it. The recital then, is no evidence of the difficulty of ascertaining the injury, which would result, from a breach of the obligation; yet, it is satisfactory, to show that the parties intended to liquidate the damages by contract; and, if the sum agreed on, is a reasonable compensation, it is proper that the intention of the parties should be upheld. The damages stipulated, are ten thousand dollars for a failure to make title to Sheppard, to the lands agreed to be conveyed, and ten thousand dollars, if he should be ejected by some one having title; being twenty thousand dollars, for the two breaches. The contract, on its face, does not show what was the value of the lands to be conveyed; and in the absence of proof, we cannot intend, that it was less than the aggregate of the damages stipulated. But it appears, from the evidence recited in the bill of exceptions, that these lands were sold by Sheppard, for twenty thousand dollars; and this, at least, is sufficient evidence, *prima facie*, to show, that there was no great disproportion between the value and the damages stipulated. The sum expressed must then be considered as the damages liquidated by the parties, for a failure to make titles to Sheppard in a reasonable time.

Though ten thousand dollars be the damages stipulated, for the failure to make title to the land, "or any part thereof" yet, that sum cannot be recovered in the present case. It was

competent for Sheppard to have refused a conveyance for a part, until the title was perfected to all; but having received it, the obligors cannot be charged, as for an entire breach. If the sum expressed, was a fair appreciation of the injury, consequent upon a failure to convey all the land; it was certainly an extravagant estimate, for a failure to convey a part of it. The declaration charges as a breach, a failure to make title to a quarter section, and a fractional section of land; impliedly admitting, that the title to four hundred and forty acres, had been perfected; and, if the recovery was not to be diminished to the extent of the comparative value of the land conveyed; upon the same principle, the entire sum stipulated would be the measure of damages, if the title remained incomplete to the poorest acre, in either of the tracts. Such an assumption would strike every one, as unreasonable in the extreme; and producing a result never contemplated by the parties.

In the assessment of damages, the sum expressed in the contract must be looked to—by completing title to a part of the land, the obligee is not entitled to recover general damages; nor can the obligors be thus charged, so as to prevent an abatement of the damages liquidated, to the extent of the relative value of the title conveyed.

The charge of the Court to the jury, must be understood to have been given in reference to the breaches alledged in the declaration; and was erroneous in affirming, in effect, that the damages stipulated for a failure to complete titles, by the testator of the plaintiffs in error, was the sum which they should find for the plaintiff below. Under no state of proof, should the sum, found by the verdict, have exceeded the value of the title to the lands not conveyed; estimating the value of the title of the several parcels agreed to be conveyed at ten thousand dollars. By ascertaining the relative value of each parcel, there would be no difficulty in graduating the recovery, so as to make a proper deduction for the title, so far as perfected, from the sum stipulated.

In regard to the contract, the jury should have been instructed, that the plaintiff was not entitled to recover upon the covenant to perfect titles generally; unless, under the circumstances, a reasonable time had elapsed for that purpose, before the suit

was brought. And, further, that the damages should have been graduated in the manner we have indicated.

The declaration of the purchaser from Sheppard, that he was satisfied with the titles that had been made to him, cannot bar a recovery. Whether his release to Sheppard from all obligation to perfect his title, would be available for the plaintiffs in error, either at law or in equity, is a question, which, as it does not arise upon the record, we decline considering. For the error in the instructions to the jury, the judgment is reversed, and the cause remanded.



JUNE TERM, 1841.

R E P O R T S
OF
CASES ARGUED AND DETERMINED,
JUNE TERM, 1841.

BATES & HINES v. THE BANK OF THE STATE OF ALABAMA.

1. A plea recited certain rules and regulations of the State Bank, proposing to make advances on cotton, on certain terms and conditions, particularly set forth in the rules and regulations—that pursuant thereto, one Major Cook, pretending to act as agent of the Bank, advanced to the defendant Bates, seventy-nine thousand six hundred and thirty-two dollars, and received from him one thousand and twenty-two bales of cotton; that thereupon, the said Cook executed a receipt, or statement setting forth the receipt, of the cotton, and advance of the money aforesaid, under the rules and regulations aforesaid; whereupon, the defendants executed the Bill of Exchange sued on, and fifteen others, amounting in all to the sum of money advanced, which were delivered to the said Cook; then follows an averment, that the said sum of money was received for, and on account of, the cotton so delivered, and not for, or on account of, the said Bills of Exchange but that the Bills of Exchange were to be held by the Bank, for the purpose of securing to it the payment of such sums as the nett proceeds of the cotton, when sold, might be less than the sum of money advanced upon it: Held

First—That this last averment of the plea was not the averment of an independent fact unconnected with the rest of the plea; but was a conclusion of the pleader from the facts previously averred.

Second—That, if it was considered as a separate averment, unconnected with the preceding averments, then the plea would be bad, as it would offer two distinct issues of fact; one upon a contract made pursuant to, and by authority derived from, the “rules and regulations of the Bank;” and another on a contract made without reference to these rules and regulations.

Third—That the plea did not question the regularity of the appointment of Cook, but impliedly affirmed it.

Fourth—The contract described in the plea, is not a dealing in “goods, wares and merchandise” within the meaning of the prohibition, contained in the 20th section of the charter of the Bank.

2. A Bank may appoint an agent to transact any business which it may lawfully do; and such appointment may be made by a mere corporate vote.
3. An artificial person is bound by the same implications and inferences, which bind a natural person.
4. The 40th section of the act of incorporation of the State Bank, is directory merely; and therefore, if a bill is purchased or discounted by the Bank, for a larger sum than five thousand dollars, the contract is not therefore void.
5. A large loan made to one individual, and separate Bills of Exchange, for five thousand dollars each, taken as security, is within the spirit, if not within the letter of the prohibition of the 40th section of the charter.
6. The meaning of the prohibition contained in the 20th section of the charter is, that the Bank shall not buy and sell goods, wares, or merchandise, for the purpose of gain; or do the ordinary business of a merchant, or trader; or engage in the business of a broker, or commission merchant.
7. A contract by which a Bank lent a large sum of money, taking Bills of Exchange at nine months for the payment thereof, and received at the time, and as one of the conditions of the loan, a quantity of cotton, with authority to ship it to a foreign port, and sell it for the account, and at the risk and expense of the owner, and to credit his bill with the amount of the nett proceeds, adding the difference of exchange between this State and the place where the cotton was sold, is not a dealing in “goods, wares, or merchandise” within the prohibition of the 20th section of the charter of the Bank.
8. A stipulation in the contract, that the Bank shall be allowed to retain one per cent. will not render the contract void; it being evident from the entire contract, that the object of the Bank was, not to obtain the cotton to sell on commission, but that the contract gave the Bank a mere authority to sell, for the purpose of paying the debt. The stipulation therefore cannot be enforced. PER ORMOND, J.
9. The plea is demurrable, because if issue were taken on it, it would admit the introduction of parol testimony, to contradict the legal effect of the contract.
10. The act of 23d December, 1837, to limit the accommodations of the Presidents and Directors of the Bank of the State of Alabama and its several branches, is, in effect, an expression of opinion by the Legislature, that the proviso to the 40th section of the charter of the State Bank, is directory merely.
11. When words used in a contract, are susceptible of two meanings; one agreeable to, and another against law, the former sense shall be adopted.
12. The subject matter of the contract, and the inducements which led to it, must be looked to, to ascertain the meaning of obscure or contradictory parts of it.
13. The different clauses of a written instrument, must be construed together, whether they precede or follow; and the Court must not allow to a particular expression a controlling force; but the intention must be gathered from the whole instrument, unless it is obvious, the parties intended otherwise.

14. The legal effect of the transaction recited in the plea is, that the bills were purchased by the bank, and the cotton received as security only, for the re-payment of the money advanced on the bills.
15. If the construction of the contract set out in the plea, is, that the money was advanced upon the cotton; it was also advanced upon the bills; and the bills and the cotton are primary and concurrent securities; and, in that event, a recovery may be had upon the bills, though the transaction, so far as it relates to the cotton, was invalid.
16. The 2nd section of the act of December, 1837, to limit the accommodation of the Presidents and Directors of the Bank of the State of Alabama and its branches, impliedly recognizes the right of the Bank to purchase from any one bills drawn on cotton. PER COLLIER, C. J.

THIS was an action, commenced by motion, by the defendants in error, against the plaintiffs in error, as drawer and endorser of a bill of exchange for four thousand six hundred and thirty-two dollars and seventy-five cents. The defendants appeared, and pleaded—first, Non-assumpsit. Second, That the plaintiff was indebted to him in the sum of seventy-nine thousand six hundred and thirty-two dollars and seventy-five cents—a part of which they offered to set off against the plaintiff's demand. And, third, A special plea, as follows:

And, for further plea in this behalf, said defendants say *actio non*, &c.; because they say, that heretofore, on the 29th day of August, 1838, at the Bank of the State of Alabama at Tuscaloosa, in the county aforesaid, the said plaintiffs adopted certain rules and regulations, in substance as follows, that is to say: "Bank of the State of Alabama, Tuscaloosa, 29th August, 1838. The Board of Directors, being desirous of placing the Bank in a situation to resume specie payments as early as possible; and to maintain the character and value of its paper; and, in order to accomplish these two important and desirable objects, she must be provided with a suitable proportion of specie and exchange funds—will make advances on cotton, under the following rules and regulations:

1. The receipt of the warehouse keeper, or the receipt of the agent of this Bank, at Mobile, or other satisfactory voucher, shall be submitted to the committee, hereafter appointed, under the provisions of the 8th section.

2. The cotton shall be shipped only to the agents for the Bank at Liverpool, New York, New Orleans or Mobile.

3. All cotton advanced on, will be shipped by the Bank, for account and risk of the party to whom the advance is made; and the Bank will, in no case, be accountable for losses, &c., except arising from neglect or mismanagement of its own agents.

4. All expenses of freight, commission, insurance, &c., shall be paid by the party for whose account and risk the cotton is shipped. The shipper may limit or fix the price, and the time at which he desires the cotton to be sold; but that limit as to price and time, must terminate at the expiration of four months from the time of its arrival in a foreign port; at which period the sales must be closed.

5. From the time the proceeds of any cotton comes to the hands of the agent of the Bank, or is deposited to its credit in any corresponding Bank, the amount of nett proceeds, with interest at the rate of six per cent. per annum, shall be allowed to the credit of the note, or bill, which have been given for the amount of said cotton.

6. Any person obtaining an advance on cotton, as above, shall give his bill at not exceeding nine months for amount advanced; secured by two good and sufficient endorsers.

7. In the event the nett proceeds of the cotton be more than the amount advanced, the Bank shall refund; if less, the party so indebted to the Bank, may settle the deficiency by a good bill, not having longer to run than the 15th February thereafter; provided the same be offered twenty days before the maturity of the bill given for the amount advanced; and no advance shall exceed twenty-five per cent. above the actual value of the cotton at the time it is received by the Bank.

8. A committee of five, the President or Cashier being one, shall be appointed; which committee shall have power to pass on any paper offered under this arrangement.

9. The Bank shall, for the mutual safety of itself and the party for whose account and risk it ships, have the right of insuring all cotton it may ship; and, in the event of loss, the insurance money shall be placed to the credit of the bill given for the advance on any cotton thus lost.

10. All the exchange, existing at the time the cotton is sold, between the United States and Liverpool for cotton sold there,

if any, shall enure to the account of the shipper, the Bank retaining one and a half per cent. for the transaction.

11. The Bank will appoint one agent here for the purpose of receiving, sampling, marking and shipping cotton to the agent at Mobile; and shall be allowed twelve and a half cents per bale for such service.

12. The adoption of the above regulations, will not be so considered as to forbid advances from being made before the delivery of the cotton; but in cases where the citizen is in danger of having his property sacrificed, on his giving satisfactory paper and evidence of his solvency, the Bank will, under the foregoing regulations, purchase bills of exchange on New York, having not longer than the first day of February to run; provided the drawer will execute his written pledge to deliver a warehouse receipt, or the receipt of its agent in Mobile, by the tenth day of February next for a sufficient quantity of cotton to cover said bill, to be shipped to our agent in Liverpool, New York or New Orleans. The drawer of the bill shall have the privilege, after delivering the cotton to our agent, of taking up the bill payable in New York with one payable in Mobile, at nine months from that time; and in case the cotton is not delivered agreeably to contract, the bill shall be forwarded to New York and protested, and the parties immediately sued.

13. That Pitcher & Ball, our agents in Mobile for receiving and shipping cotton, be furnished with a copy of the foregoing regulations; and that they be authorized, until otherwise instructed, to receive cotton on account of this Bank, for shipment to Liverpool; and that they transmit the number of bales, marks, weights, classification and valuation of such lots or parcels of cotton; and on such report and receipt, the shipper will receive his advance here, according to the foregoing regulations.

14. That Messrs. Fontaine & Prince are appointed the agents of this Bank at Liverpool; Messrs. William & Robert Kelly, at New York; Messrs. Pitcher & Ball, at Mobile; and Messrs. Marr, Brown & Co., at New Orleans;—John Marrast, Joel White, Robert Jemison and James Hogan, committee.

Whereas, different opinions are entertained, as to the inten-

tion of this Bank in the tenth section of the cotton regulations.

Be it therefore resolved, in all cases of shipment, whether to New York, New Orleans, or Liverpool, or elsewhere, beyond the limits of this State, that the difference of exchange shall enure to the planters, except the per cent. retained by the Bank for the transaction, and that the same be reduced, so as in no case, to exceed one per cent.

And the said defendants further say, that, afterwards, on the 5th day of May, 1839, the said defendant, Bates was lawfully possessed, as of his own property, of one thousand and twenty-two bales of cotton, then being in the City of Mobile, in this State, of great value, to wit: of the value of eighty thousand dollars; and the said defendants further say, that, on the said fifth day of May, in the year aforesaid, at the City of Mobile aforesaid, and not at the Bank of the State of Alabama, in the County aforesaid, one Major Cook, pretending to act as the agent of the plaintiffs, under the rules and regulations aforesaid, advanced to the said defendant, the said Bates, on said one thousand and twenty-two bales of cotton, seventy nine thousand six hundred and thirty-two dollars seventy-five cents; and therefore, the said defendant, the said Bates, then and there delivered the said cotton to Messrs. Pitcher & Ball, the agents of the said plaintiffs, in the City of Mobile, appointed by the 14th section of said rules and regulations, so adopted by said plaintiffs, as aforesaid; and the said Major Cook, so pretending to act as agent, &c., as aforesaid, then and there made and delivered to the said defendant, Bates, a certain paper writing, in the word and figures following, that is to say, "Bank of the State of Alabama, Tuscaloosa, May 1st, 1839. The President and Directors of the Bank of the State of Alabama, have advanced John M. Bates, of Greene County, seventy-nine thousand six hundred and thirty-two dollars seventy-five cents, on one thousand and twenty-two bales of cotton, agreeable to the regulations adopted at a meeting of the board of Directors, on the 29th August, 1838; which is to be shipped to Messrs. Fontaine & Prince, of Liverpool, who are the agents of this Bank; said cotton is to be sold for the benefit of

said John M. Bates, and the proceeds are to be placed to the credit of this Bank, in Liverpool, England.

MAJOR COOK, Agent."

And the said defendant, the said John M. Bates, thereupon then and there made the said bill of exchange, in the plaintiff's notice described; and also, fifteen other bills of exchange, each for the sum of five thousand dollars; all of said bills of exchange, bearing date and becoming due, and payable at the same time, with the said bill in the said notice described; all of which, said bills were then and there endorsed by Frederick C. Ellis, now deceased, and the defendant, Hines did, then and there deliver the said bills of exchange, so made and endorsed as aforesaid, to the said Major Cook, pretending to act as agent, as aforesaid. And the said defendants further say, that the said seventy-nine thousand six hundred and thirty-two dollars seventy-five cents, was advanced to and received by the said defendant, Bates, on the said first day of May, eighteen hundred and thirty-nine, in the City of Mobile, and not at the Bank of the State of Alabama, in the County aforesaid, for and on account of said one thousand and twenty-two bales of cotton, so delivered to Messrs. Pitcher & Ball, as aforesaid, and not for, or on account of said bills of exchange, or any, or either of them; and that the said bills of exchange were made, endorsed and delivered, as aforesaid, to the said Major Cook, pretending to act as agent, as aforesaid. On the said first day of May, in the year 1839, in the City of Mobile, to be thereafter, delivered to the said plaintiffs, and to be held by them, for the purpose of securing to the said plaintiff, the payment of such sum, as the nett proceeds of said one thousand and twenty-two bales of cotton, might be less than the said sum of seventy-nine thousand six hundred and thirty-two dollars seventy-five cents, so advanced to and received by the said defendant, Bates, and for and upon no other consideration, or purpose whatever. And the said defendants further say, that afterwards, to wit: on the day of , in the year aforesaid, the said bills of exchange were delivered to and received by the said plaintiff, for the purpose aforesaid, and this said defendants are ready to verify, wherefore, &c.

The plaintiff took issue to the country, on the first and second pleas, and demurred to the third plea, which demurrer was sustained by the Court; whereupon, the defendants withdrew their first and second pleas, and declining to plead over to the third plea, judgment was rendered for the plaintiffs; from which the defendants prosecute this writ of error, and assign for error, the judgment of the Court below, on the demurrer to the third plea.

PECK, for the plaintiff in error, in argument, insisted that the Bank, although, the property of the State, was a mere corporation and as such possesses those powers only, which are conferred by the charter, or necessary to its existence. [3 McCord's Rep. 377; 2 Peters' 323; 4 Whea. 136; 16 Johns. Rep. 358; 2 Cow. 678; 13 Peters 587; 5 Porter 309; 1 Stew. 307; 12 Whea. 68; 2 Cranch 166.]

If the charter prescribes a mode of contracting, and that mode is not observed, or if a contract be made, which the charter does not authorise, in either case, the contract will be void, and no action can be maintained on such contract. [7 Wend. 482; 5 Conn. 500; 13 Peters 487; 2 *ibid.* 527.]

Denies that the transaction described in the plea, was legal, because there was no express authority in the charter, authorising it; nor was it necessary to enable the Bank to exercise any of the powers expressly granted. [4 Peters' Rep. 169; 3 Wend. 485.]

Insists, that it was a dealing in goods, wares, and merchandise, and within the meaning of the prohibition contained in the twentieth section of the charter. [Aik. Dig. 62; 1 Ala. Rep. N. S. 161; 8 Gill & Johns. 272, 319.]

ELLIS & THORNTON, contra. Insisted that the Bank had power to create an agent. (13 Peters 587; 21 Wendell 296; 3 Cow. 684; 12 Wheat. 70.)

That the substance of the contract recited in the plea was, that the money was lent on the bills; and that the cotton was taken as collateral security; that it was in the nature of a pledge. But if, within the prohibition of the charter, though it might authorise a forfeiture of the charter, it could not be taken advantage of, by the defendants.

They also insisted, that the prohibition, not to purchase a bill of exchange, for more than five thousand dollars, was directory merely. In support of these propositions, they cited Story on Bailment 315; 15 Wendell 218; 11 Pickering 482; 15 Johns. 390; 2 Cowan 310; 8 Wheaton 349; 12 Sergeant & Rawle 264; 7 Cranch 299; 19 Johns. 60; 21 Wendell 186; 1 Randolph 78; 12 Wheaton 81; 3 Rand. 141; 9 Mass. 423; 5 Littell 46; 2 *ibid.* 301; Breese Rep. 203; 16 Mass. 102; 2 Kent's Com. 291.

ORMOND, J.—The first question presented is upon the plea: What are its allegations? and what did the parties intend to put in issue? The plea which is elaborately drawn, consists of several distinct facts, all however connected together and evidently supposed by the pleader to tend to the result which is relied on as a bar to the action, that the transaction was a "*dealing in goods, wares and merchandise*" and therefore prohibited by the charter of the Bank.

It commences with setting forth certain rules and regulations adopted by the Bank, for its government in the projected design of advancing or leading money on the security of cotton, placed under its control, and proceeds to allege that the defendant, Bates, being possessed of one thousand and twenty-two bales of cotton in Mobile, one Major Cook, pretending to act as the agent of the Bank, *under the rules and regulations aforesaid*, advanced to the defendant on the cotton, seventy-nine thousand, six hundred and thirty-two dollars, seventy-five cents.—That thereupon the cotton was delivered to Pitcher & Ball, the agents of the Bank, appointed to receive it by the 14th article of the rules and regulations of the Bank set out in the plea; that thereupon Cook executed a receipt or statement, setting forth the receipt of the cotton and advance of the money, under the rules and regulations entered into by the Bank; that thereupon the bill of Exchange here sued on and fifteen others, amounting in all, to the sum of seventy-nine thousand six hundred and thirty-two dollars, seventy-five cents, were executed and delivered to Cook.

It is then averred in the plea, that the said sum of money was received for and on account of the cotton so delivered, and not for or on account of the said bills of Exchange, but that the bills of Exchange were to be held by the Bank for the purpose of securing to it the payments of such sums as the nett proceeds of the cotton when sold, might be less than the sum of money advanced upon it.

On the part of the plaintiff in error, it was insisted that the last averment in the plea, was the statement of a substantive fact, showing the intention of the parties to the contract and admitted by the demurrer to be true; whilst the defendant in error by its counsel, insisted that this statement in the plea was merely a conclusion from the facts previously stated, and could not be considered as the averment of a distinct and independent fact.

There is no rule of pleading better established than that a plea should present a single ground of defence, though it may consist of many facts so connected together as to present a single point. Thus in this case, the regulations of the Bank, and the acts of the parties in Mobile, the delivering of the cotton, the receipt by Bates of the money, and the execution and delivery of the bills of Exchange, though entirely distinct in their nature, may all be embraced in one plea if they all tend to produce a certain result and were well pleaded, if the design of the pleader was to state the facts necessary to enable him to raise the question whether the transaction thus set forth was authorised by the charter of the Bank, or, whether as affirmed by him, it was a "*dealing in goods, wares and merchandise,*" and therefore unauthorised and void. If as he now contends, the last averment in the plea was of a fact shewing the intention of the parties unconnected with the previous allegations of the plea; why were the previous allegations introduced? Are the averments that the rules and regulations recited in the plea were made by the Bank; that pursuant thereto. and by authority derived therefrom, Bates received the money specified in the plea, delivered his cotton, and executed and delivered the bills of Exchange to the agents of the Bank, mere surplussage? or were these averments not intended rather, to present to the court all the

facts of the transaction that the law arising thereon might be determined. It seems to us that no other conclusion can be attained, and that the statement which it is contended now, is the averment of a separate and independent fact, is merely the conclusion of the pleader from the facts previously alleged. If the plea be not so considered, it would then present two distinct issues of fact; one upon a contract made under the "rules and regulations" of the Bank, as recited in the plea; and another upon a contract by which the money was advanced on cotton without reference to those "rules and regulations." This could not be supported if such was the design of the pleader: but we are very clear that such is not the meaning of the plea, but that the last averment, is to be taken in connexion with, and as subordinate to, the previous averments in the plea, which indeed would be without meaning unless so interpreted.

The pleader in describing the acts of Cook, the agent of the Bank at Mobile, speaks of him as "the pretended agent of the Bank:" but we do not understand that it was thereby intended to put the fact of his agency in issue, if such had been the intention, it should have been distinctly averred, that he had no authority to act as agent of the Bank. But such could not have been the design of the pleader, because it is admitted in the plea, that the defendant dealt with him as the agent of the Bank, received from him the money which was advanced, and took from him a receipt or statement setting forth the whole transaction; it is also averred that the Bank received both the cotton and the bills of Exchange, which is in effect an admission by the Bank of the agency of Cook.

It was however insisted in argument, that the Bank had no power to create an agent for the purpose of carrying into effect the contract described in this plea. If the contract is not in itself illegal, it will not become so by being made on the part of the Bank, through the medium of an agent.

Whatever may be the rule as to corporations existing only by the common law, it is now well settled both in England and the United States, that whatsoever a corporation, created by statute, may lawfully do, it may transact by its agent.—

That such agent may be appointed by a corporate vote, and that such appointment will be inferred in the case of an artificial as of a natural person, by such acts as create a presumption of agency.—4 *Bar. & Cress.* 575—13 *Peters'* 519—12 *Whea.* 64—12 *Serg. & Rawle*, 264—21 *Wendell*, 296—8 *Wheaton*, 338. (See also, *Angel & Ames on Corporations*, 122, and the authorities cited in support of the text.)

The questions of law arising out of the plea, which go to the merits of the case, are—

1st. The effect of the prohibition in the 40th section of the act of incorporation, against the purchase of any draft or bill of exchange for a larger amount than five thousand dollars.

2d. Is the contract described in the plea, within the meaning of the 20th section of the charter, which forbids the Bank to “deal in goods, wares, or merchandize.”

1. The bill of exchange sued on, in this case, is for less than five thousand dollars, but it is averred in the plea, that upon the delivery of the cotton to the agent of the Bank, and the receipt of the money advanced upon it, that this bill and fifteen others, for five thousand dollars each, all drawn and endorsed by the same persons, bearing date and payable at the same time, were executed and delivered to the agent of the Bank.

The language of the 40th section of the charter of the Bank is, “It shall not be lawful for the President and Directors of said Bank to purchase or discount any draft or bill of exchange for a larger sum than five thousand dollars, and on every draft or bill of exchange purchased or discounted by the said Bank, there shall be at least two responsible endorsers, each of which shall be considered good for the amount of such draft or bill. Provided,” &c.

It is very clear that the directions contained in this section cannot be evaded by the Directors of the Bank by splitting up a large loan of money into fragments, and taking several bills from the same parties for the whole amount. Considering this transaction, for the present, as a loan of money, secured by bills of exchange, we are very clear, that if it is not within the letter, it is at least within the spirit of the prohibition. It cannot be

disguised, that the loan of money, though apparently divided into small sums, is a single transaction, and is, in effect, a loan to the same individuals, of the enormous sum of near eighty thousand dollars; thus producing the very result which it was the design of this clause to guard against. This being the character of the transaction, what are the legal consequences attending it?

The counsel for the plaintiff in error maintains, that the contract is void, in consequence of this violation of the charter, and that no recovery can be had on either of the bills of exchange.

The general principle, that a corporation can make no contract which it is not either expressly authorized to make by its charter, or which is not necessary to enable it either directly or indirectly to fulfil the purposes of its creation, is clearly shewn by the authorities cited. Some diversity, however, appears to exist upon the question whether the particular form prescribed in the act of incorporation must be observed to make the contract obligatory. It is not, however, necessary from the view we take of this case, to enter on that inquiry. But be the rule of construction in this class of cases ever so strict, it must be admitted that in most, if not every act of incorporation, while certain rules are prescribed which cannot be transcended, and the observance of which are essential to the validity of its contracts, there are others which are merely *directory* to the officers of the corporation, and their observance not necessary to the validity of contracts made in reference to them. The cases of *The Commissioners, &c. vs. Leckie*, 6 Serg. & Rawle, 166—*The Bank of the Northern Liberties vs. Cresson*, 12 ib. 306—*The Bank of the United States vs. Dandridge*, 12 Wheaton, 64—and *Bulkley and others vs. The Derby Fishing Co.* 2 Conn. Rep. 252, conclusively establish this proposition.

The rule is thus concisely stated by Mr. Justice Story, in the case cited from 12 Wheaton: "That some of the provisions of the charter and by-laws, may well be deemed directory to the officers, and not conditions, without which their acts would be utterly void, will scarcely be disputed. What are to be deemed such provisions must depend on the sound construction of the

nature and object of each regulation, and of public convenience and apparent legislative intention." If the clause of the charter we are considering is brought to this test, its true character cannot be misunderstood. The management of a private stock Bank might be safely left to the jealous scrutiny of the stockholders, but an institution like ours, in which the Directors had no private interest, required to be guarded and secured by checks on the conduct of the agents of the public, to whom the management of the Bank might be intrusted. Accordingly we find, among other restraints, that the Directors were ordered not to lend on note more than two thousand dollars to one individual, or to advance more than five thousand dollars in the purchase of a bill of exchange. The reason of this restraint is most apparent—its intention cannot be misunderstood—it was to secure the Bank against loss by the loan of large sums to one person. To accomplish this object, not only the amount is limited, but the Directors are required to take at least two responsible endorsers, either of whom shall be considered good for the whole amount. We presume no one would say the latter part of the clause was not directory, and yet it stands precisely on the same footing with the previous part.

It was doubtless expected by the Legislature, that its commands would be obeyed by its agents, but it is impossible to suppose that it was contemplated as the result of a regulation intended to protect the public against loss, that if by collusion with the Directors, or as was doubtless the fact in this case, by an honest mistake on the part of the Directors, an individual could succeed in getting, on a bill of exchange, a larger sum than the charter allowed, that the same regulation would protect him against paying it. Whatever may be the liability of the Directors in such a case, nothing can be clearer to our minds than that the borrower must refund the money. Any other construction would place the entire capital of the Bank at the mercy of a venal directory and profligate borrowers.

We might advert to other portions of the charter, which are also directory to the officers of the Bank, and having the same object in view, the protection of the capital of the Bank; but

among them all, none is more clearly directory than this, or more unequivocal in its character.

The Court is therefore unanimous in the opinion, that this clause of the charter is *directory merely*; and that if it be disregarded, no one, a party to its violation, can take advantage of it.

2. The principal question in the cause, depends on the construction to be put on the 20th fundamental law of the Bank, considered in connection with the contract set out in the plea.

The language of this rule is, "The said Bank shall not deal in articles of goods, wares or merchandize, in any manner whatever, unless it be to secure a debt due the said Bank, incurred by the regular transactions of the same, as is provided for in this act."

What is meant by the term *deal* in goods, wares or merchandize? The counsel for the defendant in error, maintained that it should receive such a construction as would embrace any meaning which could be attached to the phrase: Thus, he insisted, that "to have to do with," was one of its meanings, and having been once applied by this Court to the same term, as employed in another Bank charter, in the case of *the Branch Bank at Montgomery vs. Knox & Co.*—(1 Ala. Rep. N. S. 148,) should be considered the proper construction of the phrase in this clause. One of the safest modes of interpretation of the meaning of words in a statute, is, to presume that language, not technical, is used in its natural and popular sense, unless the context requires a different interpretation to carry out the intention of the Legislature. This mode of expounding a statute, will, in the great majority of instances, lead to a correct result; whilst on the other hand, where there is no ambiguity or doubt as to the meaning of a term, to reject its plain and popular sense, and which so considered, harmonizes with the object the Legislature must have had in view, and to resort to lexicographers to ascertain some remote and recondite sense, in which it may be employed or understood, would be to defeat the intention of the enactment,

The design of the Legislature, in the prohibition we are considering, was possibly, to protect the State against improvi-

dent contracts, by dealing in merchandize, for which such an institution would not be well qualified, when brought in contact with the shrewdness and sagacity which characterize individual enterprize. But the main and evident design was, to protect the citizen against the overwhelming influence of such a large capital coming into competition with the citizen, in the ordinary pursuits of trade and commerce, and to prevent the fluctuations and convulsions to which trade and commerce would be subjected, by the employment of such a large capital in any of the usual pursuits of our enterprising population.

This being the design, the phrase to "*deal in*," evidently means to *buy and sell for the purpose of gain*; or it might, without any strained construction, be construed to mean, the taking or receiving of goods, wares or merchandize, to be sold for the owner for a profit, or commission. The interdict of the clause would therefore embrace not only the mercantile pursuit, of buying and selling goods, wares and merchandize, for gain, but would also include the sale of merchandize for and on account of the owner—or what is commonly called a brokerage or commission business. There can be no doubt that cotton is merchandize, within the meaning of the prohibition, and that all chattels which may be the subjects of commerce, are also included.

In the case of the *Bank vs. Kuox*, cited from 1 *Ala. Rep.* 118, this Court was called on to construe the language in the charter, "to deal in bills of exchange," and we then held, that to carry out the obvious intention of the Legislature, the term to deal, must receive a liberal construction, and that it would authorize the taking of a bill of exchange, payable elsewhere, for collection merely. This conclusion was attained, by considering the language employed, in reference to the subject on which it was to act, the powers, duties, purposes, and object of the creation of the Bank. The Court hold this language:—"This power necessarily extends to all transactions with bills of exchange, which are in themselves lawful, and considered by the Bank as expedient, to enable it to increase its business or extend its profits. It might, and frequently would, be very

important for a Bank to collect the same bills which it would be hazardous to purchase, either from the risks attending the course of trade, or because the solvency of the parties might be questionable. To receive them thus, would be important, whenever it became necessary to import specie, or provide a fund at a distant place. These illustrations, we consider sufficient, to show, that the *dealing* in bills, is not necessarily, a *purchase*, but it also includes the taking of them for collection."

It is important to consider, that in the case just cited, a power was conferred on the Bank, and in ascertaining its extent, the Court, according to well established principles, held the power to be co-extensive with the objects intended to be accomplished. It may also be remarked, that the Court held, that the Bank had the power to receive the bill for collection, by virtue of its duty to receive money on deposit, without invoking the aid of the clause to *deal* in bills of exchange.

In this case, the exercise of a power is *forbidden* to the Bank, and the same rule of construction which obtained in the case cited, would be obviously improper in this. The consequence to which it would lead, would be, that the Bank could not purchase such articles as would be necessary to enable it to perform its functions. The prohibition was doubtless inserted out of abundant caution; for if it were not in the charter, the Bank would be confined in its contracts, to those subjects upon which it was contemplated it should act, by its nature—the capacities conferred on it by the charter, and the object of its creation.

In the case of *Fleckner against the Bank of the United States*, (8th Wheaton, 338) the Court was called on to construe the words of a prohibition in the charter of that Bank, which were, "deal or trade in goods, merchandize, or commodities, whatsoever." The Court held, "that the true interpretation of the rule was, not that it prohibited purchases generally, but that it prohibits buying and selling for the purposes of gain. It aims to interdict the Bank from doing the ordinary business of a trader or merchant, in buying and selling goods for profit, and uses the words "deal" and "trade," in contradistinction to purchases made for the accommodation or use of the Bank, or resulting from its ordinary banking operations."

The language of the prohibition in this case, is more extended than that of the one at bar; but we are unable to perceive any substantial difference between them. For it will be observed, the language is to "deal or trade," by which was certainly meant by the Legislature, (as the Court say,) that the words were of equivalent import; superadding the word "trade," therefore, could not, and did not affect the question. After a most anxious examination of the question, such an one as its great importance and the responsibility of the decision are well calculated to command, we have not a doubt as to the proper construction of the prohibition we have been considering.

It remains now to inquire, what is the nature of the transaction recited in the plea. Is it a purchase of cotton, for the purpose of sale? or was it a receipt of cotton, by the bank, to sell on commission for, and on account of the owner? or was it a loan or advance of money, for which the borrower was undoubtedly responsible, with an authority to sell the cotton for the payment of the debt?

These inquiries are to be answered by an examination of the "Rules and Regulations of the Bank," recited in the plea.—These constitute, in fact, the contract between the parties. They are propositions made by the Bank, and promulgated of the terms on which it was willing to lend its money, which when acceded to, and executed by a compliance with its terms, became obligatory on both parties.

To a full understanding of this matter, it is necessary to look at the history of the country at the time this proposition was made by the Bank, in August, 1838.

In the early part of the year 1837, owing to the convulsions in commerce, and other causes, there was a general suspension of specie payments by the Banks of the different States—and by the sudden withdrawal of the accustomed supply, commerce languished, and great distress pervaded the entire community. As a necessary consequence of this state of things, confidence was lost, and the bank, though willing to pursue its accustomed course, could not do so without the risk of increasing the a-

mount of indebtedness to the Bank, which was already too great. In addition, by the act of the called session of 1837, the Banks of the State were required to replenish their vaults with specie. During the existence of this state of things, the bank adopted and promulgated the "rules and regulations" now under consideration. The preamble states, "That the board of directors being desirous of placing the Bank in a situation to resume specie payments as early as possible, and to maintain the character and value of its paper, and to accomplish those important and desirable objects, must be provided with a suitable proportion of specie and exchange funds, will make *advances on cotton* under the following rules and regulations."

Here the object and purpose is distinctly stated, but however laudable the end might be, it will not justify the use of unlawful means. It is stated that the Bank would "make advances on cotton," and this expression was laid hold of as showing the character of the transaction; but it is obvious that the Bank could not by affixing a particular name to it, alter its character. This instrument like all others, must be considered altogether to arrive at its meaning—and it is expressly stated in the preamble, that the "advance" will be made under the following rules and regulations; to them therefore we must look to ascertain its true intent and meaning.

The sum of these "articles" is, that any person having cotton in possession, might have it valued, and upon its delivery to the agent of the Bank, receive an advance thereon, not to exceed twenty-five per cent. above the actual value; and should thereupon give his bill for the amount received, payable in nine months, with two good endōrsers. The cotton so received by the Bank, was to be shipped by it, at the risk and expense of the owner, who had the right to limit the price and time for, and at which the cotton should be sold; but this power ceased at the expiration of four months from the time of the arrival of the cotton in a foreign port. Upon its sale, the nett proceeds were to be placed to the credit of the bill, with interest at six per cent. per annum; the excess, if any, to be paid by the Bank to the shipper, who was also to be entitled to the benefit of all

difference of exchange, when the cotton was sold in a foreign port, except one per cent. which the bank was allowed to retain. The Bank to be accountable for no losses but those arising from the misconduct or mismanagement of their agents. In the event the proceeds of the cotton did not pay the bill, the bank agreed to take for the deficiency a good bill on New-York, not having longer to run than the 15th February thereafter, if offered twenty days before the first bill fell due.

The 12th article of the rules was designed to provide for those cases where a citizen was greatly pressed for money, but had not his cotton ready to deliver; in such cases the bank agreed to purchase bills of exchange on New-York, having not longer to run than the 1st February, provided the borrower would execute a written pledge to deliver in Mobile, to the agent of the Bank, a sufficiency of cotton to pay the bill; and in that event, was to be permitted to take up the bill on New-York, by one payable in Mobile at nine months.

It would be idle to consider the proposition of the Bank an offer to purchase cotton; nor was that contended for by counsel. What then was its character? In our opinion, it is a loan of money for the repayment of which, the borrower permits the Bank to have the control and sale of cotton delivered at the time of the receipt of the money. The transaction, it is true, was not an ordinary one, but the times were extraordinary. The ordinary mode of transacting this business would have been for Bates to have shipped this cotton himself, to some foreign port, to have drawn a bill against it, and sold the bill to the Bank. Had he done so, the amount in the hands of his agent to pay the bill, would have been the sum the cotton produced after paying all expenses. So in this case, the nett proceeds of the cotton, with in addition, the difference of exchange between this country and that in which the cotton was sold, goes to pay his debts here. Or suppose him to have shipped his cotton and had the funds transmitted to him in gold and silver, this he could by sale at the advance between the price of specie and the depreciated paper of the Bank, have converted into the paper of the Bank, and discharged his bills. Or further, sup-

pose that he had sold his sterling bills for the currency of the Bank; and paid the debt—in either of these cases the result would have been the same as that produced by the contract actually made. How then does the bank gain or he lose by the mode adopted in the contract actually made? Not the least that we can perceive; the result appears to be precisely the same.

This being the fact, with what propriety can this be called a *dealing in cotton*, within the meaning of the prohibition of the charter? What avocation or pursuit of the citizen does it interfere with? In what manner does it bring the capital of the Bank in conflict with the pursuits of individual enterprise? The contract of the Bank is not, that we can perceive, obnoxious to any of these objections; and to prevent these, was the sole purpose of the interdict in the charter.

It may be said that it would tend to diminish the profits of the commission merchant in Mobile, by abridging his business, but if we were to concede that such a remote consequence as this would make the contract void, the consequence itself would not follow; for if the owner of cotton did not wish to ship it to a foreign port, he would not want the aid of the Bank; therefore, the arrangement offered by the bank could not affect the Mobile commission merchant.

With no propriety of language can the transaction set out in the plea be considered a *dealing in cotton*; whether the term be considered in its popular sense, or in reference to any consequence which could flow from it as an interference with the ordinary business of the country. It is true, that the Bank acquired by the contract a right to control the sale and receive the proceeds of an article of merchandize, and it has sometimes been said that *names are things*; but courts of justice look at the substance of things and endeavor to ascertain the true intent and meaning of parties. There is no canon of legal criticism which authorises the court to sacrifice the plain intent and meaning of the parties to the letter of the contract, especially in a case where the question is whether there has not been a forfeiture of a charter, and that too in a case where the actors are the mere agents of the public.

When this contract was made, the public were clamorous for accommodations at the Bank—the directors were willing to give the accustomed facilities to trade and commerce, and to relieve the agricultural class, if it could be done with safety to the Bank; to accomplish these purposes, this plan was devised.

It was also strenuously urged that the fact that the Bank took bills of exchange which were not to fall due until a period within which the cotton would be sold, and agreed still further to prolong the time of payment for any deficit which the cotton might not yield, shows that the loan was made on the cotton, and that the bill of exchange taken at the time, was a mere incident.

There can be no doubt that one object the Bank had in view was to procure specie, and for that purpose, as well as to secure the payment of the loan, insisted on such an arrangement as would secure at the same time the payment of the debt, and supply it with specie. But as this motive was not only a legal, but a laudable one, we cannot perceive how the admission that such was the fact, can affect the question. It seems also to have been expected that the bills would be paid, or nearly so; by the sale of the cotton, and therefore no reason existed for demanding payment sooner; and that expectation explains the promise made by the Bank to wait with the parties for the residue, if disappointed in the sale of the cotton.

Every corporation, unless expressly forbidden, has by implication of law, the power to do such acts as are essential to its existence, or necessary and proper to enable it to perform its functions, and fulfil the object of its creation; and this consideration alone will go far to show that this contract was lawful, because it was a mode of replenishing the vaults of the Banks with specie. This was a duty which it was under the highest obligation to the people of this State to perform; not only because the principal object of its creation was to furnish a sound currency, but because there was an express legislative injunction to increase the amount of specie in its vaults. How was this to be accomplished? Specie no longer flowed as a circulating medium in the usual channels of commerce, but had become an article of *merchandize*. To go into the market and

purchase it with its own notes depreciated as they were, would have been ruinous to the Bank—to exact it from its debtors would have been ruinous and unjust to them, had it been practicable. As the Bank was forbidden to purchase, for sale, the great staple of the country, and the purchase of foreign bills was hazardous, it would seem the Bank embraced the only alternative left, to replenish its vaults with the precious metals, and at the same time accommodate our own citizens. We do not mean to say, however, that it was the only alternative; it is sufficient, that it was a means to accomplish one of the principal objects of its creation, and not *forbidden* by the charter.

Still less are we to be understood that no errors were committed in the execution of the plan;—there was at least one, which it is strange was not foreseen. It might have been foretold, without the gift of prophecy, that when the Bank permitted the borrower to receive on his cotton an amount which could only be returned by a sale of the cotton in the event of a great increase in price in the foreign market, they were sowing the seeds of future law suits. This was an error, however, which though the Bank may lament, the borrower ought not to complain of. Loans should also have been confined to the actual owners of cotton, and speculation, as far as possible, precluded. These evils, however, grew out of an abuse of the plan, and did not necessarily flow from it, or at all events were not contemplated.

The 12th section of the “Rules and Regulations,” which proposed to make loans of money on a *future* pledge of cotton, secured in the mean time by bills of exchange, to those who were greatly pressed for money, and who had not the ability *then* to deliver the cotton, is quite conclusive to show that, at least in that class of cases, the loan was made on the security afforded by the bills of exchange, and is quite persuasive of the opinion of the Board of Directors, of the character of the contracts they were proposing to enter into, and their motive for engaging in it.

Our opinion, however, has been formed from the contract, as set out in the plea. Detached parts of it, and single expres-

sions may, doubtless, be selected, which considered alone, and independent of the manifest intention of the parties, the scope and design of the contract would justify the conclusion that the money was advanced on the cotton, and that the bills were merely taken as collateral security; but considered as a whole, we have not the slightest doubt that it was such a contract as the Bank might lawfully make under its charter—that it was a loan of money, secured by bills of exchange, for the re-payment of which, and as one of the conditions of the loan, authority was given to the Bank to direct the sale of a specified amount of cotton, and appropriate the proceeds to the payment of the bills. That the Bank has no power to make such a contract as this, to enable it to perform its functions, has not been, and we think cannot be, shewn.

It was also insisted, by the counsel for the plaintiffs in error, that the reservation of one per cent. by the Bank, above the expenses, shows that this was the common case of goods received, to be sold on commission. We are satisfied that the Bank cannot, under this contract, retain any amount beyond the actual expense attending the shipment and sale of the cotton, insurance, &c. This reservation was doubtless made from the habit of Banks to charge a commission on cashing checks of other Banks, and probably, to cover such incidental expenses as postage, &c. which could not well be ascertained at the time of the settlement of the accounts. Be this as it may, the reservation of this small amount as a commission for the transaction, cannot be held to give such a character to the contract as to change its entire object and purpose, which was obviously not to obtain cotton to sell on commission, but as already stated, was entirely different in its character, purpose, and design, and so understood by all parties. Nor does it appear, or is it alleged, that the Bank claims the right to retain this sum so reserved. The case of *The New-York Fire Insurance Co. vs. Sturges*—2 Cowen, 675—is, in one aspect, very similar to this point of this case, and indeed, much stronger.

We have been admonished, by the counsel for the plaintiffs in error, that, notwithstanding the State is the party interested,

as defendant, on this record, the true interest of the people will be promoted by declaring the contract void.

It required no admonition to impress us with the conviction that the high trust reposed in us by the people, imperiously demanded of us to preserve pure the fountains of justice. Nor will we profess an insensibility which we do not feel, to the approbation of the enlightened and the virtuous; although all experience shows that such is not always the meed of upright conduct. Our station imposes on us the necessity of deciding the cases brought before us, according to our opinion of the law: it is a duty which we cannot avoid. If left to our own choice, it is not probable we would have selected this question for adjudication; and as, in our judgment, the law is for the State, such must be our decision, be the consequences to us what they may, and although the judgment may subject us to the imputation of the bias which the argument of counsel supposes.

Something was said in the argument of the morality of this defence. On the one hand, the defendants were considered as public benefactors, resisting an unlawful claim, and on the other, as setting up an unjust defence.

How far the defendants may be bound in honor or conscience, to refund money received by them on a contract which they have voluntarily entered into, and of which they have had the benefit, is a question which they have a right to settle for themselves: such considerations can exert no influence in this Court.

It remains but to add, that there is no error in the judgment of the Court below, and it is therefore affirmed.

COLLIER, C. J.—If this were a case of ordinary interest, I should content myself by declaring my acquiescence in the judgment of affirmance, but the vast amount depending upon our decision, and the zeal which has been manifested in the argument, admonish me that it is proper to express the views which have convinced my judgment, of the perfect correctness of the conclusion of a majority of the Court.

The concluding averments of the plea, if not deductions from the facts stated, must be considered as a substantive ground of

defence ; and in that view the plea is demurrable ; because it embodies the matter for several pleas. And so much of the plea as avers that the bill was delivered and received for the purpose merely, of securing such part of the sum borrowed, as might not be reimbursed by a sale of the cotton, is bad ; because (as will be hereafter shewn,) such an averment is a denial of the *legal effect* of the written transaction, and if issue were taken on it, would tolerate the admission of parol evidence for that purpose.

In respect to the agency of Cook, it is not denied ; and it can not be doubted, at this day, but a corporation may appoint an agent to transact business within the scope of its powers. It is admitted that Cook acted under an authority from the Bank, and his acts have been recognised by the Bank, as the record sufficiently shews.

It cannot be seriously insisted that the *proviso* to the 4th section of the Bank charter is *imperative*, in declaring "That no individual shall at any time be indebted to the Bank as indorser on any draft or bill of exchange, for a larger amount than five thousand dollars." In addition to what has been said by my brother ORMOND on this point, I have only to remark, that reports have been repeatedly made to the Legislature, showing that members of the two Houses, and some of the Directors have been indebted, largely more than five thousand dollars to the Bank. Instead of resolving that such excessive accommodations were unauthorized, the act of the 23d December, 1837, "To limit the accommodations of the President and Directors of the Bank of the State of Alabama and its several Branches," by direct implication, admits that they were not illegal. It is by that statute enacted, that it shall not be lawful for any President or Director thereafter to be indebted to the State Bank or its Branches in a larger sum than ten thousand dollars, with the exception of the President and Directors of the Branch Bank at Mobile, who are limited in their indebtedness to the Bank and its Branches, to the sum of twenty thousand dollars.

But the main question to be considered is this, is the contract alleged in the plea, such as the Bank was authorised by its charter to make ? The solution of this question makes it necessary to examine into the character of the regulations adopted by the

Bank on the 29th August, 1838 ; and to inquire whether, in their adoption, the Directory transcended their powers.

1. The first branch of the inquiry may be most intelligibly answered, by laying down the rules for the construction of contracts so far as applicable to the present case. It frequently happens that a part of a writing contradicts some other portion of it, so that the whole cannot operate together, if literally interpreted, or a literal interpretation may defeat the object of the parties. When this is the case, if the subject matter of the contract be legal, resort must be had to construction.

In expounding agreements, the construction must conform as nearly as the rules of law will admit, to the apparent intention of the parties. Where a writing or some clause is capable of two significations, it should be understood in that sense which will have some operation, rather than that which will have none. If therefore the words used be susceptible of two senses, the one agreeable to, the other against the law, the former sense shall be adopted. *Ut res magis valeat quam pereat*. The subject matter of a contract, and the inducements which lead it, must be looked to in determining the meaning of contradictory or obscure parts of it.

Again : in the construction of all instruments, the Court must not allow to a particular expression a controlling force, but the intention must be gathered from the whole writing ; unless it be manifest that its author intended otherwise. And the different clauses in the same instrument, must be construed in reference to each other, whether they precede or follow.

An agreement is to be understood according to its sense or meaning, as collected from the terms used in it, which terms are themselves to be understood in their plain, ordinary and popular sense, unless they have generally, in respect to the subject matter, as by the known usage of trade, &c. acquired a particular sense, distinct from the popular sense ; or unless the context evidently points out that they must, in the particular instance, and in order to effect the immediate intention of the parties, be understood in some special sense.

In expounding a contract, extraneous matter explanatory of it, may be resorted to—form is regarded as unimportant, if its es-

sence and meaning can be ascertained, consistently with its terms. These rules all rest upon the highest authority.—*Chitty on Con. ed.* 1839, 62 to 75, and cases cited—*Pothier*, p. 1, c. 1, § 1, art. 7—*Harper vs. Hampton*, 1 H. & Johns. Rep. 672—*Fallow vs. Martin*, 1 Harper's Rep. 410—*Falcon, adm'r vs. Harris*, 2 H. & M. Rep. 550—*Archibald vs. Thomas*, 3 Cow. Rep. 284—*Wells vs. Hunter*, 17 Martin's Rep. 121—See also 2 Cow. Rep. 195—8 Mass. Rep. 214—10 Mass. Rep. 379—11 Mass. Rep. 302—11 Pick. Rep. 154—4 Dall. Rep. 345.

Dr. Leiber, an author of profound erudition in his work upon "*Legal and Political Hermeneutics*" says, "Faithful interpretation implies, that words or assemblages of words be taken in that sense in which we honestly believe that their utterer attached to them;" page 99. The probable sense of words must prevail, unless the text indicates, that they were used in their original etymological sense.—*ibid.*

Words of a general meaning must be taken in an expansive sense, if the text shows that they were thus used, but not if they have been used to express something definite or absolute—*ib id.* 137—144.

The same words even in the same text have not always a sameness of meaning—in one place it may be general—in another restricted—in one a technical—in another a popular meaning—*ibid.* 167.

The general and superior object cannot be defeated by a less general and inferior direction. If therefore we may attach two or more different meanings to a sentence, that is the true one which agrees most with the general and declared object of the text—*ibid.* 112.

Having stated these principles as our guides, we proceed to the examination of the contract alleged in the plea of the plaintiffs in error. The rules and regulations of the Bank recite as a preamble, that "The board of Directors being desirous of placing the Bank, in a situation to resume specie payment as early as possible, and to maintain the character and value of its paper, and in order to accomplish these two important and desirable objects, she must be provided with a suitable propor-

tion of specie and exchange funds; will make advances on cotton under the following "rules and regulations," &c.

In addition to our own knowledge (as a matter of current history,) of the condition of our banks, we are informed by an act of the Legislature of the 30th June, 1837, that they had a short time previously suspended specie payments. That act approved the suspension, but required the bank, at different periods up to the first of July 1841, to procure and deposit in their vaults, amounts of specie bearing a prescribed proportion to their capital stock, with a view to the resumption and continuance of specie payments.

The object of the bank was doubtless well intended—among other things to enable it to comply with the requisitions of the act. It is not intimated that it proposed to engage in the purchase of cotton, but only, that it was willing to obtain the control of that article, if the regulations adopted were complied with.

Stress has been laid in argument upon the term "advance," as being itself sufficiently potent to show, that the bank parted with its money upon the faith of the cotton alone; and that the bill was merely received as a security, for any sum which the cotton might fall short of reimbursing. Such an argument is clearly indefensible. A single word or clause, no matter where its position, or how strong and direct in itself, cannot be allowed to give a meaning to the instrument, obviously against the intention of the directory, and utterly subversive of the object contemplated. The verb "advance," as applied to commerce means, "To supply before-hand, to furnish on credit; or before goods are delivered, or work done; or to furnish a part of the stock, or fund; as to *advance* money on loan or contract, or towards a purchase or establishment." As used in the regulations of the bank, it means a loan of money to a party, who as a means of guarantying its repayment, either delivers or undertakes to deliver to the agent of the bank, a quantity of cotton, worth at the time of the loan within 25 per cent. at least, of the amount of the sum borrowed. But although this loan be made upon cotton delivered, or agreed to be delivered, yet the regulations when looked to, as an entire instrument, most expli-

citly show that before any contract in regard to the cotton could be consummated, the bank must have assented to the purchase of a bill, for the payment of which the cotton is to be placed under its direction. No stipulation for the cotton was to be made until a bill, such as the charter requires, viz: "with two or more good names thereon" shall have been purchased by the bank. True the purchase of a bill and the receipt of the cotton may have been simultaneous, yet in the order of things the former must have preceded the latter; for until the bill was purchased, the bank would not advance its money, and could consequently acquire no right to control the sale of cotton.

The regulations pointing out who should be the consignees of cotton at different places, &c. were doubtless dictated by a cautious regard to the supposed interest of the bank. As the bank adopted such a measure, for the purpose of procuring specie and exchange funds, it was indispensable to a compliance with the provisions of the act of June 1837, that its funds when realized should be in hands which would honestly hold them subject to its order. It was further proper, that the agents of the bank should be known to persons applying to borrow money, that they might determine whether they were willing to intrust the sale of their property to their prudence and discretion. Such a precaution was very natural. Confidence in the integrity or solvency of those engaged in commerce, had to a great extent become impaired. Instances of failure and a want of moral principle, were not unfrequent among those who had ranked high in public estimation.

The directory manifested an indisposition to lend money, when the cotton was not to be delivered immediately. In such case it was necessary to satisfy them, that the applicant for a loan was solvent—the paper offered was good—and that he was in danger of having his property sacrificed, in consequence of his inability to pay some demand against him. In addition to all which, he was required to give his written pledge, that he would deliver the receipt of a warehouse man or his agent by a prescribed day, for a sufficient quantity of cotton to cover his bill. Here then we learn that it was not the sole object of

the bank to obtain "specie and exchange funds," but to relieve to some extent the pecuniary pressure existing in the community. The performance of this latter office, however, was made subservient to the former duty.

As the object of the Bank is sufficiently indicated by the regulations, the reservation to itself of *one per cent.* on the sales of cotton, cannot defeat the contract by which it acquired the bill; even conceding that it may have afforded to the plaintiffs in error, a legal ground before the cotton was sold, to reclaim it, and prevent an appropriation of the proceeds to the payment of the debt. But the object in making this regulation, we think, was not to make a profit to the bank, but merely to indemnify it for any incidental charges it might incur in supervising the business, and obtaining the possession of the funds arising from the sale. Be this as it may, the Bank cannot insist upon a right to retain more than the actual expences of directing the business, &c.

Taking the regulations as a whole and applying to them the principles we have laid down, we think the transaction between the plaintiffs and defendant may be thus stated. Bates being desirous of borrowing money from the Bank, applies to its agent in Mobile—makes bills with two indorsers who are reputed good, and proposes as a further security to place under the control of the bank a large quantity of cotton. The agent receives the securities offered, and pays him the money. What is this *in point of fact*, but the lending of money upon the credit of the bill, with the cotton as collateral security? The bill is actually *purchased*, and the bank becomes its *proprietor*, while the cotton is received as a *security only*, for the repayment of the money advanced. Words and forms we have seen are nothing, if the intention of the parties can be ascertained from a view of the entire transaction, the contract must conform to it.

That the parties intended to contract in reference to the law cannot be doubted. No advance of money was to be made, unless a bill with two good indorsers was given, no matter what quantity of cotton was delivered. And it is our duty as alrea-

dy shown, so to construe their contract, if practicable, that it may have the effect which the parties designed, instead of being inoperative and in derogation of the charter of the Bank. To attain this conclusion we need but look at the regulations themselves—their object—the state of things existing in the country at the time of their adoption, &c. In determining the meaning of a contract, the situation and true intent of all parties as well as the subject matter we have seen, are to be considered. And it has been held, that where there are several writings made at the same time between the same parties, and relating to the same subject, they constitute but one agreement, and the court will presume such a priority in the execution, as will best effect the intent of the parties. *Newell vs. Wright*, Mass. Rep. 138—*Summers' adm'r vs. Williams, et al*, 8 Mass. Rep. 214—*The T. & S. Boston T. Cor. vs. Whiting*, 10 Mass. Rep. 327—*Fowle vs. Bigelow*, 10 *ibid.* 379.—*Hopkins vs. Young*, 11 *ibid.* 302—*Stephens vs. Baird*, 9 Cow. 274—*Makepeace vs. Harvard College*, 10 Pick. Rep. 302—*Sibley vs. Holden*, *ibid.* 250—*Hunt vs. Livermore*, 5 *ibid.* 395.

So solicitous have courts been to effectuate the intention of the parties, that they have held the same words to convey different meanings, according to the context and subject-matter. Thus in *Pugh and wife vs. Duke of Leeds*. Cowp. Rep. 714, a lease was made to hold "from the day of the date." The question was, whether "from" meant inclusive or exclusive of the day. Lord Mansfield pronounced a most elaborate judgment, in which after reviewing the authorities upon the subject he concludes, that it may mean either "That the parties necessarily understood and used it in that sense which made their deed effectual. That courts of justice are to construe the words of parties, so as to effectuate their deeds and not to destroy them; more especially where the words themselves abstractedly may admit of either meaning."

So where there appeared no intention to enter into a contract in violation of law, yet if such would be the effect of the agreement, if literally interpreted, courts under the influence of the maxim *ut res magis valeat quam pereat*, have enlarged or

restricted the meaning of the words employed, that the contract may operate rather than fail. Thus in *Harrington vs. Klopprogge*, 2 B. & B. Rep. 778, note, which was an action upon a bond for the performance of an agreement to assign "any office of trust, commission, place, or pension whatever." The defendant objected to the validity of the agreement; *First*, that it was illegal and void by statute, being for the purpose of assigning all offices, &c. and that to assign an office of trust was illegal. *Second*, that by the common law offices of trust could not be assigned. Lord Mansfield said, "there is nothing in the objection. The agreement is for the assignment of all offices, and is good as to all offices *which may legally be assigned*.—The profits arising from this office of private secretary to Lord Holdernessee might be assigned; and as to all others they are not within the present case."

Upon the same principle says an eminent elementary writer, "If by a particular construction, the stipulation of the party would be frivolous and utterly ineffectual, and the apparent object of the contract in reference to its subject-matter, &c. would be frustrated; but a contrary exposition, though *per se* the less appropriate (looking to words only) would produce a different effect; the latter interpretation shall be applied to the agreement, if it can possibly be supported by any thing in the contract, or the nature of it. Chitty on Con. 4 American ed. 67. To the same effect is *Davis' heirs vs. Taul & wife*, 6 Dana's Rep. 53.

Thus we see the great anxiety manifested to sustain and expound contracts according to the understanding of the parties, where there was no intention to violate the law. A principle dictated by the most enlightened equity, and one which cannot be departed from, without impairing the morality of the law, and lessening the respect of the community for the tribunals of Justice. The regulations of the Bank, were evidently not framed with a regard to precision in the employment of words and cannot therefore receive an etymological construction; consequently it is the duty of the court to give to them such a meaning as consistently with *their nature and object*, and the popu-

lar use of the terms, they should receive. This I have endeavored to do, and must be permitted to say, that I cannot doubt, that the contract in regard to the cotton, is according to the acknowledged rules of interpretation, accessorial to the loan of money upon the bill.

Let it however be conceded, that the view which I have taken is indefensible, and that the transaction *was a direct advance of money on cotton*, and then I will show, that the plaintiffs in error do not occupy a more favorable position. If the regulations of the Bank are to be literally construed, the loan was not made upon the faith of the cotton, but upon the bill also; each of which was simultaneously delivered by the borrower to the Bank. This being the case the lender would have two securities for the payment of the money; and these, though shown by distinct writings, constitute parts of an entire contract. The plaintiffs can't place their case in a stronger point of view (consistently with the facts set out in their plea) than this. They cannot say that although the bank required a bill with two good names on it, to be given before money would be advanced on the cotton; and although such a bill was given and received, before the money was lent, yet the advance was made *exclusively* upon the faith of cotton. Such an allegation cannot be entertained. It goes directly to contradict by parol proof, the *legal effect* of a written contract, which is regarded quite as conclusive and sacred as the letter of the contract itself. Where a written contract appears on its face to be complete, you can no more add to, or contradict its legal effect, by parol stipulations, preceding or accompanying its execution, than you can alter it through the same means in any other respect. *Sommerville vs. Stephenson and another*, 3 Stew. Rep. 271; 3 Phil. Ev. C. & H's ed. 1469-70, and the cases there cited. Here according to a close construction of the written contract, it appears that Bates delivered to the agent of the Bank, one thousand and twenty-two bales of cotton, and fifteen bills of exchange exclusive of the one in suit, for five thousand dollars each, with two good names thereon, being such bills as its charter authorised it to purchase, and received therefor seventy-nine thousand, six hundred and thirty-two dollars and seven-

ty-five cents. The cotton was to be sold by agents named by the Bank, and the proceeds applied to the payment of the loan. The bills were protestable at maturity, if not paid, so that the liability of all the parties might be fixed. Upon the cotton being sold and its nett proceeds proving insufficient to pay the sum borrowed, Bates had the privilege of adjusting the deficiency, by a good bill having not longer than the 15th February thereafter to run. This, as I understand it, is a fair statement of the agreement between the parties, according to the *most rigid interpretation*. The bank then has a two-fold security for the money it has lent, or advanced if you please, viz: upon the bills, and the cotton. The first is such a paper as it may by the express terms of its charter advance on; the latter it can only deal in, for the purpose of securing a debt which may be due to it. The question now arises, if one of the securities be unauthorized by statute, or in other words illegal, is the other security which is legal thereby rendered invalid. Lord Hobart speaking in reference to the statute of 23 Hen. 6, ch. 9, which declares if any of the sheriffs, &c. shall take any obligation in any other form, by colour of their office, that then it shall be void, "says that the statute is like a tyrant; when he comes he makes all void. But the common law is like a nursing father, makes void only that where the fault is, and preserves the rest."

Norton vs. Simmes, Hob. Rep. 12 c. page 48—Malèverer vs. Redshaw, 1 Mod. Rep. 35. This remark of Lord Hobart has been frequently misapprehended. It has been quoted to prove that a contract void in part by statute is void *in toto*, while it establishes no such principle. It is a mere declaration, that where a statute prescribes the form of an obligation, and enacts that one taken in any other form shall be void, if the terms of the statute are departed from, no obligation is incurred by the party undertaking to bind himself. Thus far the remark is well founded in law.

In Kerrison vs. Cole, 8 East's Rep. 236; the instrument in question was a bill of sale and mortgage of a ship, which by statute was declared to be "utterly null and void, to all intents

and purposes." In the instrument was a covenant to repay the money lent. Mr Justice Lawrence remarked that the decision of Lord Hobart did not apply to different and independent covenants and conditions in the same instrument; which may be good in part and bad in part, and that the undertaking to repay the money was good as a personal covenant. And with him the whole court concurred.

In the case of *Greenwood vs. The Bishop of London*, 1 Marsh. Rep. 292, the court state with great clearness, the distinction between those cases, where the statute had declared the instrument taken in any other form than that prescribed by the statute to be utterly void; and those cases where it had declared the instrument void only as to the illegal act, grant or conveyance. And in *Ex dem. Thompson vs. Pitcher*, 2 Marsh. Rep. 61, Lord Chief Justice Gibbs in considering the argument, that if the deed was void as to part, it must be void as to the whole, remarks, "if the objection had been derived from the common law, it is admitted that it would not be the consequence. But it is urged that the statute makes the whole deed void. The truth is, there is no difference between a transaction void at common law, and void by statute. If an act be prohibited, the construction to be put on a deed conveying property illegally is, that the clause which so conveys it, is void equally whether it be by statute or common law. But it may happen, that the statute goes further, and says that the whole deed shall be void to all intents and purposes: and when that is so, the Court must so pronounce, because the Legislature has so enacted; and not because the transaction prohibited is illegal. I cannot find in this act any words which make the entire deed void, &c. I think this grant of that interest in land, which by the terms of the grant is to be applied to a charitable use, is void; and that the deed, so far as it passes other lands not to a charitable use, is good." And this, say the Supreme Court of the United States, in the *United States vs. Bradley*, 10 Peter's Rep. 343, is the clear result of the English authorities.

In the latter case, the Court remarks, "That bonds, or other deeds may in many cases be good in part, and void for the residue, where the residue is founded in illegality, but not *malum*

in se, is a doctrine well founded in the common law, and has been recognised from a very early period. Thus in Pigott's case, 11 Co. Rep. 27, b. it was said that it was unanimously agreed in 14 Hen. VIII, that if some of the covenants of an indenture, or of the conditions indorsed upon a bond are against law, and some are good and lawful, that in this case the covenants or conditions which are against law are void *ab initio*, and the others stand good." *Further*, "There is no solid distinction in cases of this sort, between bonds and other deeds, containing conditions, covenants, or grants not *malum in se*, but illegal at common law; and those containing conditions, covenants, or grants illegal by the express prohibitions of statutes. In each case, the bonds or other deeds are void as to such conditions, covenants, or grants which are illegal, and are good as to all others, which are legal and unexceptionable in their purport. The only exception is, when the statute has not confined its prohibitions to the illegal conditions, covenants or grants; but has expressly or by necessary implication, avoided the whole instrument as to all intents and purposes." To this effect are *Mouse vs. Leake*, 8 Term Rep. 411—*Wigg vs. Shuttleworth*, 13 East's Rep. 87—*How vs. Synge*, 15 East's Rep. 440—*Newman vs. Newman*, 4 M. & Selw. Rep. 66—*The Post-Master General vs. Early*, 12 Wheat. Rep. 136—*Smith vs. United States*, 5 Peters' R. 293—*Farrar & Brown vs. The United States*, 5 Peters' Rep. 373. Many other citations might be made to the same point, but the question may be regarded as indisputably settled.

In the case before us, the statute contains nothing more than an inhibition against dealing in "goods, wares and merchandise," without declaring to be void the entire instrument by which such dealing may be evidenced; and if the cases cited, may be regarded as correctly ascertaining the law, the advance upon the bills is clearly distinguishable from the direct advance upon the cotton. Where two securities are given at the same time, for the payment of a debt; if there is nothing in the terms, or nature of the contract, indicating a different intention, they are regarded as primary and concurrent, and neither will be considered as subsidiary to the other. And if

the agreement of the parties is reduced to writing, parol proof going to vary its *legal effect*, is inadmissible, upon the ground, that it would establish a contract, different from that to which the parties had assented, and thus defeat their intention by a lower grade of evidence. There is certainly nothing in the nature of the contract and the character of the securities, to show that the bills were auxiliary to the cotton; but if either be secondary, as already shown, it must be the cotton.

This being the case, if the transaction was illegal as it respects the cotton, it was competent for the plaintiffs in error, thus far to have avoided it any time before the sale, and left the Bank to its remedy upon the bills. But the case presented by the record, is not an effort to defeat the security of the defendant upon the cotton. It discovers an attempt to prevent the collection of a bill, which was obtained from the plaintiffs, by the loan of a sum of money of an equal amount; because the defendant was induced to advance its money, not upon the bills alone, but the further security of the cotton also. Such a defence cannot be tolerated, without an utter disregard of many solemn adjudications, and over-riding principles of law resting upon the firm basis of reason and equity; and consequently, it can never receive my sanction. The sale of the cotton, and an appropriation of the proceeds to the payment of the bills *pro tanto*, can have no influence upon the right to recover the residue.

It was objected at the argument, that the Bank, by its contract with Bates, became his commission merchant for the sale of the cotton received. Without undertaking to deny, or admit, the truth of this assumption, it is according to the view which I have taken of the case, wholly immaterial of what character in point of law, was the control which the contract gave the Bank over the cotton. If it is regarded as a mere security for the payment of the bill, the validity of the bill cannot be affected by the invalidity of the security. So, if the money was advanced on the cotton directly, it was also advanced on the bill; and although the former be void, the latter security is not thereby impaired.

The fact that the bill was payable in Mobile, and the cotton to be sold in Liverpool, is a feature in the transaction which

cannot influence, to any extent, the decision of the cause. If the cotton was a security for the payment of the bill, it was entirely competent for the parties to stipulate that it should be sold in Liverpool, or elsewhere, without prejudicing a recovery upon the bill. And whether thus regarded, or as a direct security for the money, it was entirely competent for Bates, at any time before the sale, to have claimed it. In the former case, it would have been necessary to make his claim available, to show that the bill had been paid; in the latter, as the Bank had no right to retain it, there would be no necessity for extinguishing the debt. This brings me to consider the second branch of the inquiry, viz: Is the contract between Bates and the Bank such as the Directors were authorized to make?

2. The answer to this question must depend upon the construction of the 20th section of the Bank charter, which is in these words:

“The said Bank shall not deal in articles of goods, wares and merchandize, in any manner whatever; unless it be to secure a debt due said Bank, incurred by the regular transactions of the same, as is provided for in this act.”

It may be well to premise, that the rules in regard to the construction of contracts, apply also to statutes, (Leiber's Hermenueutics, 166); that the causes which lead to the enactment of a law, may be consulted for the purpose of ascertaining its meaning where doubtful, (ibid. 167); and that the letter of a statute may be enlarged or restricted by an equitable construction, so as to carry out the intention of its framers, (Dwarris on Sta. 724 to 728.)

The preamble of the act to establish the State Bank, recites that—

“Whereas, it is deemed highly important to provide for the safe and profitable investment of such public funds, as may now, or hereafter, be in possession of the State, and to secure to the community, the benefits, as far as may be, of an extended and undepreciating currency: Be it therefore enacted,” &c.

Here is an explicit and, doubtless, a sincere declaration on the part of the Legislature, of the causes which prompted it to charter a Bank, viz: *First*, to provide for the safe and profitable investment of the public funds. *Second*, to secure to the

community the benefits of a sound and extended currency. To effect these objects, which are intimately connected with each other, it was quite natural that the corporation should have been prohibited from dealing in "goods, wares and merchandize." It could not, with safety, advance its funds, upon the mere pledge of property for their re-payment; such a security being liable to waste, decay and destruction. Nor could it engage in the business of buying or selling—the fluctuating value of all property would make such an investment, more or less, hazardous; besides, if it did not affect the soundness of its currency, it would necessarily limit the extent of its circulation, and thus defeat one of the cardinal objects, which the Legislature proposed to effect.

The idea that this restriction upon the power of the Bank, (as insisted at the argument,) was to prevent it from becoming a competitor in the purchase of the staples of the country, is to me entirely novel. I heard the debate in the Senate upon the Bank bill in December, 1823. The measure, I think, owes its origin to an individual who has since filled the highest office in the State, and is still respected for his virtue, intelligence and gentlemanly bearing. The debate was mainly conducted by the author of the bill on the one side, and the learned counsel (who, but for sudden indisposition, would have argued this cause for the plaintiffs) on the other. During that discussion, not a word was said as to the necessity or propriety of taking from the Bank a capacity to enhance prices, by prohibiting it from directly going into the market as a speculator, or giving to its funds such a direction, as would aid the views of others in their speculations. If it had have been supposed, that an institution, with so small a capital as that with which our State Bank commenced business, could, by the emission of its paper, have advanced very sensibly the staple of the country, I am quite sure that it would have encountered much less of opposition.

If a solicitude, in 1823, to prevent the Bank from enhancing the products and other property of the country, induced the insertion of the 20th section, it is wonderful to contemplate the change the public mind underwent in 1832, when the first Branch was established, and during the intervening period, up

to 1835, when the last Bank charter was enacted. Even up to the latter period, when the country had become pressed down by debt, incurred in consequence of the facility with which money was obtained upon loan, the demand was loud for an increase of the banking capital. It was said, that such was the disproportion between the issues of the Banks and the staple of the country, that the planter could not sell his cotton at home for a price which the foreign market justified. The fashionable expression was, "our banking capital should be increased, that the resources of the State may be developed!" I mention these things merely to show, that the legislation of this State in regard to Banks, has never been directed with a view to depress prices, or to check the most active speculation in the products of the soil.

The object of the 20th section, according to the established rules of construction, must have been such as I have indicated; or else it must have been inserted as a matter of course; because a similar provision was found in other Bank charters.

The section is certainly beneficial in its tendency, and should be so construed as to give effect to the intention of the Legislature. The view which I take of this case, does not require me to show, that the prohibition should receive any other than the most extensive construction. I only insist, that it is not necessary that the debt, to be secured by dealing in "goods, wares and merchandize," as the exception authorizes, should be past due. If it be a regular transaction by which the debt to the Bank is incurred, though the day of payment has not arrived, the case comes within the exception. No particular stress can be laid upon the term "due." It was only intended to complete the sentence, and express the idea of indebtedness, whether to be discharged presently, or at a future period. "Payable to," or "owing to," would have expressed the meaning intended; but "due," when considered in reference to the subject matter, is quite as appropriate.

The case of a sum of money already agreed to be paid to the Bank, does not come within the mischief it was intended to prohibit; but a debt running to maturity, comes within the spirit of the exception to the prohibition. It was intended to place a restriction upon the Bank, to prevent it from so dealing

as to defeat the object of its creation; and, at the same time, to confer on it such authority, as would enable it to secure its debts. It may, and has sometimes, happened, that the Bank is over-reached, and discounts paper that is not secured by responsible sureties or endorsers. In such case, it is important to its interest, that it be authorized to obtain collateral security as soon as the character of the parties to the paper is discovered. It is then obvious, from the reason of the thing, that the Legislature did not intend to restrict the exception to paper already *due*, but to extend it to all liabilities regularly incurred to the Bank.

But taking it as true, that the section we are examining, was inserted as a check to secure "the safe and profitable investment of the public funds," and "the benefits of a sound and extended currency;" and its object and purpose cannot be defeated, because, in loaning its money, the Bank received as security for its repayment, "goods, wares and merchandize," in addition to such paper as it is authorized by its charter to discount. Such a transaction, instead of thwarting the intention of the Legislature, is calculated to advance it; as the security upon property would more certainly insure payment, than a mere personal liability upon a note or bill. This being the necessary conclusion, it follows, according to the principles of construction, that the prohibition of the 40th section, will not avail the plaintiffs in error as a bar to a recovery.

It is argued for the plaintiffs, that as the Governor and House of Representatives disapproved of the regulations of the Bank, their opinion should be regarded as strong persuasive evidence, that in the transaction between Bates and the defendant, the latter exceeded its powers. The Journal of the House of December and January, 1838--9, which has been cited to prove the fact, which the argument asserts, by no means satisfies me, that transactions of the character of the one in question, were intended to be denounced as illegal; but I am disposed to think that it was merely proposed to declare, as unauthorized, the dealing in cotton generally. Be this as it may; I am quite sure, that neither the Governor nor the House ever supposed, that the entire transaction was so utterly void, as to prevent a recovery being had on the bill that was given

and purchased by the Bank simultaneously with the delivery of the cotton. If this argument were entitled to any weight, which I, by no means, admit, the *second* section of the act of December, 1837, "to limit the accommodations of the President and Directors of the Bank of the State of Alabama and its several branches," furnishes an ample set-off. That section, after limiting the indebtedness of the President and Directors of the Branch Bank at Mobile, concludes with the following *proviso*: "That nothing in the foregoing sections shall be construed to prohibit the said Bank (State) and branches, from purchasing of any President or Director thereof, a bill or bills of exchange, within the limits heretofore prescribed by law, drawn on cotton insured, and actually shipped to Europe, or to Mobile, New Orleans, or any of the eastern cities of the United States, for an amount not exceeding two-thirds of the estimated value of any such shipment, and secured by a transfer to the Bank or Branch, or its agent of the policy of insurance and the bill of lading, together with such personal security as the proper board of directors shall deem ample."

This *proviso* cannot be regarded as the grant of a new and substantive power to the Bank, but was doubtless introduced, as it professes, to prevent the conclusion, that the Legislature intended, by any thing contained in the act, to divest them of the right to purchase bills of the Presidents or Directors of the Bank and its Branches, predicated on the shipment of cotton. Here is an implied recognition of the right to discount such paper for all persons. As the statute relates (as its title imports) to the Presidents and Directors of the Banks, it cannot be extended by construction to embrace persons who have no connection with them; and, consequently, there could be no necessity for excepting, by the *proviso*, those on whom the statute does not operate. The *proviso*, then, serves as a legislative opinion, that it was competent for the Banks to deal in such paper, whenever they thought proper, except so far as it restrained them.

True, in the case supposed by the Legislature, the Bank was not to obtain the actual possession of the cotton, through the medium of its agent, before it purchased the bill; yet it was to obtain the bill of lading and policy of insurance, that it might

control the proceeds in the hands of the consignee. Again: where the purchase of such a bill was made of a President or Director, the sum advanced was not to exceed two-thirds of the estimated value of the shipment. As it respects all other persons, the act being silent, and the right of the Bank to deal in such bills impliedly recognized, it will follow that, as to bills offered by them, there is no restriction.

Between the case provided for by the statute and those contemplated by the regulations of the Bank, there is no difference in principle. It is as much a dealing in cotton to advance money upon the transfer of the bill of lading and policy of insurance, as it is upon the delivery of the cotton itself. So, if the Bank be authorized to purchase bills secured by cotton, they may, unless inhibited, purchase bills with *two good endorsers*, and, in addition, receive as security, cotton worth within "*twenty-five per cent*," of the sum borrowed.

I should not have troubled myself to consider this argument of the plaintiffs' counsel, were it not for the purpose of disabusing the minds of some, who really believe, that the Legislature have declared its opinion, that all contracts, such as that between the parties before the Court, are unauthorized and void. Without adding any thing further on the point, it is enough to say, that so far as Legislative authority can avail, it is decidedly adverse to the defence set up.

I have already said more than I anticipated; but the great interest felt in the decision of this cause, has induced me to present very fully, the grounds on which my opinion rests. That these reasons will satisfy every person of the correctness of the conclusion of the Court, is what I cannot hope; but that they will free me from the imputation of being indisposed to uphold the principles of law with becoming sternness, is what I do not doubt. In common with the benevolent, I lament the extensive indebtedness which is pressing upon the country; but as a Judge, I cannot if I would, and would not if I could, so modify the law as to absolve parties from the obligation of contracts. I am contented to move *super antiquas vias*, and declare the law as it is settled. Under the influence of this feeling, I concur in the judgment of affirmance.

GOLDTHWAITE, J. *dissenting*.—In the present case, my judgment leads me to a conclusion essentially different from that of my colleagues. I may remark, before entering upon the examination of the question, in the solution of which we differ, that on all the other points, I yield my entire concurrence with the opinion expressed by the other members of the Court. Indeed, as to the point on which I dissent, I almost doubt whether my mind has been capable to comprehend the true bearings of this case; as it leads me to a conclusion, so opposite to that of those, for whose judgments I entertain the utmost respect.

The supposed inhibition of this transaction is, by the charter of the bank, expressed in these terms: "The said bank shall not deal in articles of goods, wares or merchandize, in any manner whatever, unless it be to secure a debt due said bank, incurred by the regular transactions of the same, as is provided for in this act."

It is said, this clause cannot receive a literal construction, because that would prohibit the bank from purchasing those articles; essentially necessary to enable it to perform its appropriate functions; but I accord no weight whatever, to such an argument, inasmuch as it would be manifestly absurd, to call the purchaser of paper, buying solely for his own use, a dealer in stationery; as it likewise would be to insist, that providing wood for the comfort of a household, made the buyer a dealer in lumber. It seems to me, it would be difficult, if not to say impossible, to make use of language more clear, definite and expressive than that which is contained in this section. It cannot be denied, that the words, buy and sell, are, at least, as common, and their meaning as generally understood, as the word deal; nor can it be said that these terms are equivalent and convertible; buying or selling, or both combined, may constitute a dealing; but to deal is not, necessarily, either a buying or selling. If the intention of this clause had been to restrict the bank, only to the extent of buying and selling merchandize, I cannot but believe these words would have been used. Instead of using these terms, the prohibition is, that the bank shall not *deal* in articles of goods, wares or merchandize. The author of the section, aware that the word deal, although the most compre-

hensive single word in our language, which could be applied to the subject matter, was, notwithstanding, capable of more significations than one, gives it the most unlimited extent by immediately adding, *in any manner whatever*; then, as if satisfied that the interest of the institution demanded, and that the public could not be prejudiced by an exception, he proceeds to annex the qualification, *unless it be to secure a debt due to said bank*; and still more certainly to make the exception with certainty, he specifies that it must, however, *be incurred by the regular transactions of the same*; then, as if it were for the purpose of setting construction at defiance, he closes the section with, '*as is provided in this act.*'

The effect of the construction given by a majority of the Court is, as it seems to me, to make this GENERAL PROHIBITION, of dealing in merchandize *in any manner whatever*, a RESTRICTION to the extent only of dealing in merchandize *by buying and selling it for the purpose of gain*; or to the receiving of goods *to be sold for the owner, for a profit or a commission*. If no restriction beyond this was contemplated, I think very inapt terms have been used, to express the intention, and much difficulty of construction would have been avoided, by calling things by their proper and usual names.

The evils, to any community, are precisely the same, in my judgment, whether the bank enters the market openly, as a purchaser of the staple of the country, or whether it comes in the capacity of an advancing agent. In either case, individuals must give place to the corporation, and, the more especially in such a case as this, where the terms of advancing were so liberal. If the bank possesses the authority to advance on cotton, it cannot be denied as to articles of prime necessity; and thus, by enabling speculators to engross a large portion, prices might be forced up to a most speculative and injurious extent. But a contemplation of the evils of such practices is more appropriate to the legislature, than to the judiciary; therefore, and not because the subject is exhausted, I forbear further comment on it. If, however, I was to concede that the prohibition extended only so far as to inhibit the bank from buying for gain, or selling for the owner upon commission; it seems to me, that this transaction is nothing less than the selling of the cotton for the

owner, and upon a stipulated commission to be paid by him. There is not a single stipulation in these articles, published by the bank, and which formed the basis of this contract, that is not of daily practice with commission houses in most of our cities. A commission merchant usually advances money, when required, on goods consigned to him for sale. He is responsible to his principal, for his own acts of omission, and improper conduct; and also for those of his agents, if he employs such. He is accountable for no losses, but such as arise from his own misconduct or mismanagement, or for the same acts in his agents, if he confides the property of his principal to them. And finally, he is entitled to receive the compensation he stipulates for; or, if no stipulation is made, to such as may be reasonable. The custom also is to allow interest from the period the proceeds come into his hands, and also the current rate of exchange. So likewise he is entitled to be refunded any excess of his advances over the nett proceeds of the property sold by him, or his agents. In every one of these particulars, the bank, by its contract, assumes the precise responsibilities of the commission merchant. Those intrusted to sell the cotton in the foreign port, are not the factors of Bates, but agents appointed by the Bank, and for whose conduct the bank expressly stipulates to be held responsible. It is a sale, in my opinion, to all intents and purposes by the bank itself, acting through its agents. I do not perceive how or why, if this contract is a legal one, that the bank is not entitled to the compensation for which it has stipulated.

There is another view of this case which also seems to me to be decisive that it is a dealing in merchandize. If the cotton had remained unsold at the maturity of the bills, and they had been paid by Bates in Mobile; would he have been warranted in withdrawing the cotton from the custody of the bank, or its agents, after tendering expenses? If the contract was a legal one, he would not, because it was one of the stipulations upon which the loan was made, *that the bank should be at liberty to sell it*. The contract with respect to the cotton, then, remaining in force after the repayment of the loan, by what name is it to be called? Again, suppose in this condition of affairs, it is destroyed by fire, and loss ensues, in consequence

of the neglect of the agents of the bank to insure: is there any thing in the charter of this bank to make it liable to Bates?

Yet once more; if there was a valid, subsisting right, existing in the bank to sell the cotton after the payment of the bills, and against the consent of Bates, what is there in the charter, to prevent the bank from contracting with Bates, either gratuitously, or for a commission, *and without any loan of money*, to sell his cotton in Liverpool, and become responsible for the acts of agents, with respect to it? I confess I am unable to distinguish either of these cases, in a legal point of view, from the other, and neither of them from the case at bar.

In common with the other members of this Court, I entertain not the least doubt, but that the directors of the bank, who sanctioned this transaction, were influenced by a most earnest desire, to advance the true interests of the institution, and the State at large; but the purity of intention cannot legalize an act which the charter expressly prohibits.

For these reasons, it is my opinion, that this transaction was a dealing in goods, wares and merchandize, against the positive prohibition of the 20th section of the charter of the bank; and, therefore, that the contract, and all securities, founded on it, are entirely void. The consequence, so far as this case is concerned, if my opinion was to prevail, would be, that judgment on the demurrer ought to be entered for the defendants. But, if it is asked whether this leads to the conclusion, that the State, as the sole owner of the funds of the bank, must lose the deficiency between the sum advanced, and the proceeds of the cotton, (if there is such a deficiency,) I answer, no. It is true that a nullity of the contract grows out of its illegality,—for such, I understand to be the unquestionable law of all cases; but Bates cannot insist that the contract is void, and thus entitle himself to the money advanced to him. The illegal act of the directors of the bank, could invest him with no right to the money; and, as the State is the sole stockholder or owner of the bank, it is probable, an action would lie against him to recover it. It is not the question before the Court; and therefore, it is only as to the consequences which flow from a decision, that it would be proper to inquire, whether a suit might be sustained in the name of the State, or of the bank. In my opinion, without the aid of con-

testation or argument to test its correctness; I should be inclined to think, that either might sustain the action.

There would, probably, also exist another remedy. The bank is solely owned by the State, and its directors have no interest whatever in the capital stock; from this it results, that they are mere agents, acting under the special authority, which is contained in the provisions of the charter. So long as they confine their action, with regard to the funds of the bank, and its proper business, a discretion is confided to them; but there are certain directions and prohibitions, to which, as agents, they are bound to conform their action; and, if they overstep the boundaries of their powers, and illegally dispose of the funds committed to their care, they are doubtless liable for any losses which occur, in consequence of their violation of the charter. (Taylor v. Miami Exporting Co. et al. 5 Ohio Rep. 162.)

CARTER, HOGAN AND PLOWMAN v. DOUGLASS.

1. The Circuit Court cannot entertain a motion to quash a warrant and execution, issued by a justice of the peace; although the case has been moved by *certiorari*. It must be tried *de novo*, without regard to the defects in the proceedings of the justice.
2. The refusal of the Circuit Court, to award a *certiorari*, when a diminution of the record is suggested, will not be reviewed on error.
3. General reputation cannot be given in evidence, to establish the existence of a co-partnership between individuals.

Writ of error to the Circuit Court of Talladega County.

THIS action was instituted before a justice of the peace; and after judgment, was removed by *certiorari*, to the County Court, from which, it was transferred to the Circuit Court by consent of the parties.

The defendants are described in the warrant, and other proceedings before the justice, as Carter, Hogan & Co.

The statement filed in the Circuit Court, describes them by their Christian and surnames, as partners, using the name of Carter, Hogan & Co.

Plowman, one of the defendants, and at whose instance, the *certiorari* was allowed, cravedoyer of the proceedings before the justice, and then moved the Circuit Court to quash the warrant and execution. This motion was overruled.

He then suggested, that the record was imperfect; and prayed for a *certiorari* to the justice, to send up the proper papers. The justice was examined before the Court, and stated, that all the papers appertaining to the case, had been returned under the former *certiorari*. The Court refused to award the *certiorari*.

On the trial, the plaintiff introduced several witnesses to establish the existence of a partnership between the defendants. All of these witnesses stated, that it was generally reputed and understood that a partnership existed between the defendants, in carrying on the saddlery business; that Carter was a saddler, and Plowman a tanner. This was excepted to, by defendant, Plowman.

A witness was also, introduced who proved an admission, by Carter, of the correctness of the account sought to be recovered. This was also excepted by the defendant, Plowman.

A verdict was found in favor of the plaintiff, and judgment rendered against all the defendants, who now prosecute this writ of error, and assign, that the Circuit Court erred in overruling the several motions of the defendants, and in the admission of the evidence excepted to.

The case was submitted on brief, by the plaintiff in error.
STONE, for the defendant.

GOLDTHWAITE, J.—1. The motion to quash the warrant and execution, issued by the justice of the Peace, was properly overruled, because the statute provides, that the Court shall proceed to try the claim *de novo*, without regarding any defect in the proceedings before the justice.

2. It does not appear, that the proceedings sent up by the justice, were deficient in any manner; but, on the contrary, it was shown, from his examination, that all the papers appertaining to the case, had been transmitted in obedience to the first *certiorari*. But independent of this, we think the refusal to award a *certiorari*, when a diminution is suggested in such a case as this, is the exercise of a discretionary power; which is not the subject of revision in an appellate Court.

3. It is too clear, to admit of argument at this day, that common reputation cannot be allowed as competent evidence, to establish the existence of a co-partnership between individuals. It is nothing more than rumor, and may have no foundation whatever to rest upon. We are aware, that in two cases the Supreme Court of New York, has decided such evidence is competent. [Whitney v. Sterling, 14 Johns. 215; McPherson v. Rathbone, 11 Wend. 96.] But in neither is any other adjudication cited, to sustain what must be conceded to be, an innovation on the well established rule, that hearsay is inadmissible for such a purpose. (Roscoe Ev. 212.) If a co-partnership had been shown, then the admission of one of the partners, would be proper to charge the firm for the account; but, in this case, no such connexion was shown, and therefore, the admission was improperly given in evidence.

The Court erred in admitting evidence of general reputation, and in allowing the admission of Carter, as against his co-defendants.

Let the judgment be reversed and the case remanded.

MAULDIN v. THE BRANCH BANK AT MOBILE.

1. The act of 1811, which requires, that the execution of a writing sued on shall only be denied by plea, supported by the affidavit of the defendant, does not prescribe a plea different in form, from what was proper at common law, to throw upon the plaintiff the *onus* of proving the genuineness of the writing.
2. In proceedings, at the suit of a Bank, by notice and motion, special pleading is dispensed with. Although, the plea of *non-assumpsit*, supported by affidavit, would put in issue the fact, whether an endorsement was made by the party sued; yet, an endorser may interpose a formal denial tendering an issue, accompanied by an affidavit; and in a summary proceeding this will be regular.
3. A partnership is bound for the acts of each of the partners, (done in the name, and apparently on account of the firm,) while it is supposed to exist; and to relieve themselves from this responsibility, they must give a reasonable notice, that they are no longer partners.
4. In respect to all persons who have had no previous dealings with the firm, a constructive or implied notice is sufficient. This is usually given by advertisement in a newspaper, published at the place where the firm was established, if any, if none, then in a paper published convenient thereto; and sometimes, for the greater caution, in a paper published at a point, where the firm had been accustomed to do business.
5. As it respects persons having previous dealings with the firm, notice of dissolution must be specially addressed, or personally communicated to them. This rule however, has sometimes been so far relaxed, as to allow circumstances to be proved for the consideration of a jury, from which they may infer that personal notice was received.
6. In regard to notice of dissolution, it is sufficient, if the severance of the partnership is made as notorious as the partnership itself; and as one partnership may be more extensively known than another, it follows, that the same degree of publicity is not necessary to inform the world of the severance of every firm.
7. The reasonableness of notice of the dissolution of a partnership, is a mixed question of law and fact, to be submitted to a jury, for their decision, under the direction of the Court.
8. Notice of the dissolution of a partnership, published in one of the usual advertising Gazettes of the place where the business was carried on, and in a fair and usual manner, is not only presumptive, but conclusive evidence of notice.
9. A party receiving a security in the firm name, after dissolution, may for the purpose of showing that notice had not been sufficiently diffused, prove that the partnership was more extensively known, than a jury would be warranted in inferring from the nature of its business.
10. One partner cannot, without the assent of his copartner, give a security in the firm name, for the payment of his individual debt; nor can he without such assent lend the partnership name as a surety, endorser or gaurantor for a third person.

11. A person receiving such security from an individual partner, could not recover, because he would be *particeps doli*; yet, if the paper were of such a character as to be subject to the law merchant, an innocent endorsee, acquiring it in the usual course of trade, might maintain an action against the partnership.
12. The burthen of proving the assent of the copartners, to the use of the partnership name by one of the partners, lies upon the person taking the security.
13. If the payee of a note or bill, or any person whose name appears thereon previous to the last endorser, offer it to a bank to be discounted, for his benefit, the transaction on its face imports, that the last endorsement was made to enable the offerer to raise money by its negotiation.

THIS was a proceeding by notice, at the suit of the Bank against the plaintiff in error, in the County Court of Mobile. The notice sought to recover of the plaintiff, as surviving partner of Mauldin & Morgan, upon an endorsement alledged to have been by that firm, of a note negotiable and payable at the Bank; by which note, L. Rogers, as maker, on the 14th August, 1837, promised to pay Wm. Taylor, or order, four months after date, two thousand five hundred and fifty hundredths dollars, for value received.

The defendant below, pleaded, 1. *non-assumpsit*. 2. "That the endorsement on which he is charged in said plaintiff's notice, is not his endorsement, nor made by him, or his authority; and of this, he puts himself upon the country."

The second plea was verified by the defendant's affidavit; but, on motion of the counsel for the Bank, this plea was stricken out, and the cause was tried on an issue to the plea of *non-assumpsit*.

On the trial, the defendant excepted to the ruling of the Court. From the bill of exceptions, it appears that, after the plaintiff had read the note described in the notice, with the protest for non-payment, the defendant offered a witness who proved, that the firm of Mauldin & Morgan once existed, and did business at Claiborne, in the County of Monroe, Ala.; that in August, 1836, that concern sold their entire stock, and then dissolved their co-partnership; though it was not shown, that any public notice had been given of the dissolution; Immediately after Mauldin & Morgan ceased to do business together at Claiborne, the latter removed to the City of Mobile, and formed a partnership with one Burwell Boykin, for the purpose of doing business in that City, under the style of Morgan

& Boykin ; at the time the note in question bears date, the last mentioned firm had been engaged in business about eighteen months ; the formation of the new, and the dissolution of the old partnership, were both matters of public notoriety.

Taylor, the payee of the note, testified that the note was made to be discounted for his benefit; and was discounted for his accommodation, and the proceeds placed to his credit. He further proved, that the endorsement of Mauldin & Morgan, was in the hand-writing of the latter.

On these facts, the Court charged the jury in substance as follows, viz : if the endorsement was made after the dissolution of the firm, and after public notice thereof had been given, the defendant is not chargeable, but if made during the continuance of the partnership, or even afterwards, if no notice of dissolution had been published, then the plaintiff is entitled to recover. If the endorsement was made under the circumstances supposed, the fact, that it was made for the accommodation of Taylor, cannot affect the question of the defendant's liability.

The Court further instructed the jury, that the notice of the dissolution of a partnership may be given by a newspaper publication; by recording the articles of dissolution in the office of the County Court; by posting up public notice at public places. But persons with whom the concern had dealings, must be specially informed of its dissolution.

If however, the Bank was in any manner, informed previous to discounting the note, that the firm was dissolved, then the defendant was not liable.

The defendant, by his counsel, prayed the Court to instruct the jury, that they were authorized to infer a notice to the Bank, from matters of public notoriety, and other circumstances ; which charge the Court refused to give. Another charge was asked at the instance of the defendant, and refused ; which need not be particularly noticed, as it does not raise any other question of law, than is presented by the instructions given.

A verdict and judgment being rendered for the plaintiff, the defendant has sued a writ of error to this Court.

CAMPBELL, for the plaintiff in error.

LINDSAY, for the defendant.

COLLIER, C. J.—The assignment of error lead us to inquire, *first* : Did the County Court err in striking out the second plea of the defendant. *Second* : Were the instructions to the jury conformable to law; and, *Third* : Were the instructions prayed properly refused.

First. By the third section of the act of 1811; “regulating judicial proceedings in certain cases, and for other purposes.” It is enacted, that it shall not be lawful for the defendant in any suit, founded on any writing, whether under seal or not, to deny the execution of the same; unless it be by plea supported by the affidavit of the party pleading, which affidavit shall accompany such plea, and be filed therewith.” (Aik Dig. 283.)

This statute does not prescribe the plea, by which the defendant shall be allowed to deny the making or execution of a writing sued on; but doubtless intended, without an interference with the law of pleading, further than is expressly provided, to leave the defendant to select such plea, as would, at common law, throw upon the plaintiff, the burthen of proving the genuineness of the writing. If the action was founded upon a specialty, the appropriate plea would be *non est factum*—to *debt* or *assumpsit*, on a promissory note, &c., the plea would be *nil debit* or *non-assumpsit*, according to the form of the action.

In summary proceedings at the suit of a Bank, by notice and motion, the notice does not designate, or characterize the action; and it would be difficult in many cases, to determine its form, so as to adopt the plea to the evidence to be adduced, if the strict rules of pleading were adhered to. But this difficulty cannot exist; for in prescribing the remedy by motion, it has been held, that the Legislature, “by necessary implication dispenses with special pleading, and all technicality.” (Lyon v. The State Bank, 1 Stewart’s Rep. 466.)

True, a formal plea of *non-assumpsit*, supported by an affidavit, would have thrown upon the plaintiff the necessity of showing, that the indorsement was made by the defendant, or his authority. Yet, in a case commenced as this was, the defendant was not obliged, thus to deny the endorsement; but might interpose a formal denial, tendering an issue, and veri-

fied by an accompanying affidavit. This latter mode was adopted by the defendant, and the County Court consequently erred, in striking out his second plea.

Second : A dissolution of a partnership may take place *inter partes*; and yet, the connection continue, as it respects the rest of the world. As credit is given to the entire firm, all those who belonged to it, are bound while it is supposed to exist. To relieve themselves from this responsibility, they must give a reasonable notice, that they are no longer partners; and to such as may be considered to have had this notice, they will each be answerable for his own acts, and no further.

In respect to all persons, who have had no previous dealings with the concern, a constructive or implied notice of its dissolution, will be sufficient. The most usual mode in England, of giving this notice to the world at large, was by an advertisement in the *London Gazette*, a paper which was looked to, as the organ of Commercial intelligence; but, at the present day, it is believed, that publication in some other Gazette of that country, having a respectable circulation, and convenient to the place at which the firm did business, is, perhaps, more common. [Leeson v. Holt, 1 Starkie's Rep. 186; Newsome v. Coles, 2 Camp. Rep. 617; Rooth v. Quin, 7 Price's Rep. 193.]

In the United States a constructive notice is generally given, by advertisement printed in some newspaper, published at, or near the place at which the firm was established; and sometimes for the greater caution, in a paper, also published at some other point, at which the firm had been accustomed to do business.

But, as to persons who have had dealings with the firm, during its continuance, it is requisite, that actual notice be given, or that such steps have been taken, as to warrant the inference, that it was received by the creditor. (3 Kent's Com. 38 to 40; Watson on Part. 284; Collyer on Part. 311; Cary on Part. 181.) This is most usually done, by addressing the correspondents of the firm specially, or transmitting them a circular advising them of its dissolution.

Notwithstanding, the law is thus laid down by elementary writers, yet, it has been held, in this country, that a notice of

the dissolution of a partnership, published in a Gazette, which was taken by a bank, might be regarded as a notice to the bank, though, it had had previous dealings with the firm. (*Bank of South Carolina v. Humphrey*, 1 McCord's Rep. 388 ; See also, *Martin v. Walton*, 1 McCord's Rep. 16 ; *Irby v. Vining* 2 McCord's Rep. 379; *Lansing v. Gaine & Ten-eyck*, 2 Johns. Rep. 304 ; *Ketcham v. Clark*, 6 Johns. Rep. 144 ; *Graves v. Merry*, 6 Cowen's Rep. 701 ; *Bristol v. Sprague* 8 Wend. Rep. 423.

And in *Jenkins v. Blizard*, 1 Starkie's Rep. 418, it was decided, that where the dissolution of a partnership has been advertised in a newspaper, proof that the plaintiff, who had been in the habit of dealing with the firm, has read the paper, or that it has been delivered in the usual course, at his house, is sufficient to be left to a jury, to consider whether the attention of a tradesman in reading a newspaper, is not likely to be attracted by notices of the dissolution of partnerships; and whether under all the circumstances of the case, he has not received notice of the dissolution.

We cite these cases merely to show, that the arbitrary rule in regard to notice, which has been so often declared, both by the English and American Courts, has been sometimes relaxed ; and a disposition manifested, to consider the notice given in some other form, sufficient evidence, to be left to a jury, from which, they may infer, that a party receiving an engagement, in the name of the firm, was informed of its previous dissolution.

If the severance of the partnership is made as notorious as its existence was, it would seem, upon principle, that this is all that can be required. The object of notice is, to free the ex-partners from liability to those, who may take a security in the partnership name, after the firm has been dissolved; and the ground on which a joint responsibility rests, in such cases is, that the partnership being once known to exist, its continuance will be presumed in favor of third persons, until its dissolution has been made public. When this has been done, every person may guard against acts by one of the partners, in the name of all, and all will not be chargeable with the fraud of one. (*Cary on Part. 182.*)

If it be true, that the dissolution need only to be made as notorious as the partnership; it would follow, that the same degree of publicity, would not be necessary, to inform the world of the severance of every firm. The nature of the business of one, might not make it known beyond its immediate vicinity; while the business of another, and its long standing might extend a knowledge of its existence to different parts of the world; a publication which would give notice to those aware of the partnership in the one case, would have that effect in the other, to but a limited extent. This view, we think, is sustained by *Mitchum et al. v. The Bank of Kentucky*, 9 Dana's Rep. 166. In that case, it appeared, that the plaintiffs in error, had been partners, in a small town in Kentucky, in a mill and cotton factory; the question was, whether there had been sufficient notice of the dissolution, to affect the Bank, which had had no previous dealings with the firm. The Court were of opinion, that partners, upon dissolving their connection, were not required to give personal notice to any, but those who have had previous dealings with them. They could not give direct notice to every body; and, as to those who have had no previous dealings with them, it is only necessary, that a reasonable opportunity should be afforded, of knowing the fact of dissolution. But while it is easy to perceive, that it is incumbent on the partners, to furnish reasonable means of knowledge to all who may be concerned, it is difficult to prescribe the exact nature of the means, which must be afforded, or the precise extent to which knowledge must be diffused, or circulated. "This," say the Court, "must in a great degree depend upon the nature of the business, in which the firm is engaged, and the extent of its ordinary dealings and transactions. The same means and opportunity of notice, could not be required in the dissolution of an obscure partnership, the entire sphere of whose operations, is confined to the village, or small neighborhood, in which its business is done, as in the case of a partnership, in a business more important and extensive." Further, "the reasonableness of the notice in any given case, and the extent to which it should furnish the opportunity of knowing the fact, must depend upon the nature of the occupation in which the firm was engaged, and the extent of

dealing belonging generally, to that occupation. If, from the nature of the occupation, the dealings and business of the firm should be presumed to be confined to a particular town or neighborhood, a general notice within that town or neighborhood, might be deemed sufficient; unless it were shown, that their dealings were in fact, more extensive." If this case is to be regarded as an authority, then the reasonableness of notice is a mixed question of law and fact, to be submitted to a jury, under the direction of the Court, whether notice in the particular case, under all the circumstances, has been sufficient to justify the inference of actual or constructive knowledge of the fact of the dissolution. Such is the opinion of Chancellor Kent, to sustain which, he cites quite a number of decisions. (3 Kent's Com. 39; and cases cited.) And the case of *Mowatt v. Howland*, 3 Day's Rep. 353, in which it was held, that, where all the facts are ascertained, the reasonableness of notice may be a question of law for the Court, does not oppose the conclusion we have stated. In that case it appeared, that notice of dissolution was only published in a newspaper of the place where the business was carried on; and the question was, whether it should not also have been published in the city of New York, which was in another State, but where two of the partners resided. The Court was of opinion, that the publication was sufficient notice of the dissolution to the plaintiff, who never had been a correspondent of the firm. This decision rests upon the rule, that notice in one of the usual advertising Gazettes of the place where the business was carried on, and published in a fair and usual manner, is not presumptive evidence merely, but conclusive evidence of the fact, as to all persons who have had no previous dealings with the partnership. But it does not exclude the idea, that other evidence may not be left to the jury, from which a notice may be inferred.

If the law be as we have supposed, that the notice of the dissolution of the partnership, need only be as notorious as the partnership itself, it would then follow, that as against one who had received a security from one of the partners, after the connection ceased, in the name of the firm, no notice would be necessary; if he resided, and the transaction took place at a dis-

tance, so remote from the scene of the partnership operations, as to render it improbable, that he ever heard of its existence. The distance to which a partnership may be known, must, in the absence of positive proof, depend upon the nature and extent of its business. One may not have notoriety beyond the immediate neighborhood or county in which it is established, while another may be known in other States, and a third in foreign countries. And if a party, seeking to charge partners, who have not given the usual notice of the dissolution of their connection, would show that a knowledge of the partnership was more extensive than a jury would be authorized to infer, from the mere proof of its existence and character, it will be competent, for him to introduce evidence tending to such a conclusion.

In respect to a mercantile establishment, located at Claiborne, unless its business was so inconsiderable, as to make it improbable, that it had any transactions at Mobile, the reasonable intendment would be, that its existence was known there; and, if conducted by a partnership, that the partners were also known; unless they were dormant and took no part in its management. But this intendment is a question of fact, and should have been left to the jury. Instead then, of instructing the jury that the publication of notice in a newspaper, that the partnership was dissolved, was indispensable to protect the defendant from the act of Morgan, the Court should have modified its charge, so as to make it conform to what we have indicated to be the law, applicable to the facts. In other respects, as to what would constitute a notice of the dissolution, the charge of the Court was quite as favorable, and perhaps more so, than the law would warrant.

The view we have taken of this question, seems to us, to be not only well sustained by principle, but also, by the analogies of the law, in regard to dormant parties. A partner, whose name does not appear in the firm; it is said, is only liable for goods, furnished during the time he was actually a partner, and received a share of the profits; but, if he was known to be a partner, though his name did not appear, the usual notice of dissolution is necessary to obviate future liability. (*Evans v.*

Drummond, 4 Esp. Rep. 89) Thus, in the case of Carter v. Whalley, et al., 1 B. & Adol. Rep. 11; it appeared, that Saunders, together with his co-defendants, carried on business under the name of the "Plas Madoc Colliery Company," Saunders withdrew from the firm; and it afterwards became indebted to the plaintiff; but no notice was given to the plaintiff, or the public of Saunders' withdrawal. *The Court of King's Bench held*, that Saunders was not liable for the debt, there being no sufficient evidence, that he had ever, while a partner, represented himself as such to the plaintiff, or appeared publicly in that character, so as to authorize the presumption, that the plaintiff knew of it. To the same effect, see Armstrong et al. v. Hussey et al., 12 Serg. & R. Rep. 317.

These were cases of dormant partners; and in order to charge them with an indebtedness, incurred by some member of the firm, after dissolution, it must have been shown, that they were known publicly, or to the party giving credit, to have been partners. But in the case at bar, the names of both the partners appeared in the firm; and as far as a knowledge of the partnership extended, the individual partners will be supposed to have been known.

Third: It may be laid down generally, that one partner has an implied authority to bind the firm, by contracts relating to the partnership, whether those contracts are mere oral or written agreements, or are evidenced by negotiable securities, as bills of exchange and promissory notes. (Munson v. Rumsey, 1 Camp. Rep. 384.) And where a contract is within the scope of the partnership dealings, and avowedly upon the account of the firm, all the members will be bound, though they were ignorant of the transaction, and were intentionally defrauded by the partner who entered into it. But there will be no obligation in favor of a person, who received a bill or note of a firm; if he knew the want of authority of the partner, who made or transferred it; or, if he was aware, that the consideration for the transaction did not relate to the partnership, but was a benefit to the individual partner only. (Galway v. Matthew, 10 East Rep. 264.) Yet the innocent endorsee of paper, governed by the rules of the law-merchant, may maintain an action against the firm, although the holder with notice

could not. (*Shirreff v. Wilkes*, 1 East Rep. 48; *Arden v. Sharp*, 2 Esp. Rep. 523; *Ridley v. Taylor*, 13 East Rep. 175; *Swan v. Steele*, 7 East Rep. 210; *New York F. Ins. Co. v. Bennett*, 5 Conn. Rep. 574.)

In *Chazournes v. Edwards et al.* 3 Pick. Rep. 5, it was decided, that where a note is given in the name of the firm, by one of partners, for his private debt, and known to be so by the person taking it, the other partners are not bound by such note, unless they were previously consulted, and consented to the transaction. See also, *Poindexter v. Waddy*, 6 Munf. Rep. 418; *Lansing v. Gaine*, 2 Johns. Rep. 300; *Foot v. Sabin*, 19 Johns. Rep. 154. And, notwithstanding some opposing decisions, it has been so often adjudged, as to be considered a settled principle, that one partner, without the assent of the firm, cannot pledge the partnership, either as surety, indorser or guarantor, for a third person. (*Chitty on Bills*, 9 Am. ed. 45 to 50, and cases cited; *Foot v. Sabin*, 19 Johns. Rep. 154; *Mercein v. Andrus et al.* 10 Wend. Rep. 461; *Taylor v. Hillyer*, 3 Blackf. Rep. 433; *Hamill v. Purvis*, 2 Penns. Rep. 177; *Duncan v. Lowndes*, 3 Campb. Rep. 478.)

But it has been sometimes supposed, that the assent of the other partners to the use of the firm name will be inferred, unless it is disproved, or there is something in the transaction itself, to show that it was not given. (*Sutton v. Irwine*, 12 Sergt. & R. Rep. 13; *Bank of Kentucky v. Brooking*, 2 Litt. Rep. 45.) It may, however, be considered as settled, (at least in this State,) that the burthen of proving the consent of the other partners, lies on the person taking the security. (*Rolston v. Click et al. v.* 1 Stewt. Rep. 526; see also, *Laverty v. Burr*, 1 Wend. Rep. 529; *New York F. Ins. Co. v. Bennett*, 5 Conn. Rep. 574.)

To sum up the law upon this point, we repeat, that each partner has an authority from the other, to bind the firm by a contract relating to the partnership. That one partner cannot without the assent of his copartners, give a security in the partnership name for the payment of his individual debt; nor can he, without such assent, lend the name of the firm as a surety, indorser, or guarantor for a third person. But although, the person receiving such security could not recover, because

he would be *particeps doli*; yet if the paper were of such a character as to bring it within the control of the law merchant, an innocent indorsee acquiring it in the usual course of trade, might maintain an action against the partnership.

To apply these principles to the case at bar; if the note in suit, was endorsed by Morgan, in the name of Mauldin & Morgan for the accommodation of Taylor, the endorsement would impose a liability upon the firm in favor of the Bank; unless it could be shown, that the Bank was advised, that the note was not endorsed in the usual course of business, or in other words, of the circumstances under which the act was done. In the absence of all proof, if the last indorsers, or some one whose name did not appear on the paper, offered it for discount, the reasonable intendment would be, that it was endorsed in the regular course of business, and not for accommodation. But, if the note was offered by Taylor, or some one else, who became a party to it as an intermediate indorser, to be discounted for the benefit of the offerer, the transaction on its face would import, that the indorsement was intended merely to aid the holder to raise money by negotiating the paper. (Wallace v. The Branch Bank at Mobile, 1 Ala. Rep. N. S. 565.] And if it appeared, that such were the circumstances, under which the note was acquired by the Bank, then the *onus* of showing the transaction to have been regular, or the assent of the plaintiff in error, to the use of his name, would be thrown on the defendant.

This view has been taken upon the hypothesis, that the notoriety of the dissolution of the partnership of Mauldin & Morgan, was not such, as to free the plaintiff in error, from liability upon the indorsement made by Morgan; for, if the proper notice of the dissolution of the firm, was not given, or, if the defendant had no knowledge of that fact, the partnership, as it respects the act in question must be considered as continuing.

This cause is one of more than ordinary importance; and to some extent, of first impression in this Court; and we have therefore, thought it proper to examine it thus at length, that it may serve not only as a guide in analogous cases, which may hereafter arise, but that the principles which must control its ulterior progress may be understood.

We have only to add, that the judgment of County Court is reversed, and the cause remanded.

CLEMENTS v. LOGGINS.

1. A vendee of land cannot entitle himself to a rescission of the contract, by tendering the purchase money, and demanding title before the time stipulated by the contract for making the title.
2. Nor is it any objection that the title is not then in the vendor, if he can obtain the title.
3. Where the payee of a note is inquired of, by one wishing to purchase it, whether he has any defence against it, and answers that he has none, he does not thereby preclude himself from making any defence against the note growing out of the original transaction, of which he had no knowledge at the time. But if, when so inquired of, he promise to pay it, if purchased, he will be compelled to pay it at all events.

Error to the County Court of Tuscaloosa.

THIS was an action of assumpsit, brought by the plaintiff in error, as assignee, against the defendant in error, as maker, of two promissory notes for two hundred dollars each, dated the 25th February, 1837, and due respectively on the 25th December, 1838 and 1839. Plea, non-assumpsit; and judgment for defendant. Pending the trial, a bill of exceptions was taken at the instance of the plaintiff; from which it appears that, in December, 1836, one William E. Cotten bought of Obadiah Cooper, the payee of the notes sued on, a quarter section of land, for seven hundred dollars, secured to be paid by four notes—one for one hundred dollars, due the 1st March, 1837—and three for two hundred dollars each, due successively the 25th December, 1837, 1838 and 1839; and that he received a bond, with condition to make him title on payment of the purchase money. That being unable to comply with his contract, the defendant, a short time before the first note fell due, agreed to take the bargain off his hands; and gave Cotten one hundred dollars in money to take up the first note, and executed three notes, the counterparts of those executed by Cotten to Cooper; which notes and money were received by Cooper, and Cotten's notes were given up, and a new bond was executed for title to the defendant. The bond for title being

carried by Cotten to defendant, it was discovered to bear date on the 21st December, 1836; and was conditioned to make title to *Cotten* on the payment of the last instalment, which fell due on the 25th December, 1839. Defendant took the bond and kept it, but said it was of no value to him, and he must have another bond. Cooper sold the land as his own, and when he executed the bond, said he would as soon make title as give a bond.

Some time in December, 1838, the defendant offered to pay Cooper the amount due on the land, and demanded title. Cooper admitted that he could not make title; that he had never had title himself; that the notes for the purchase money, were the property of the plaintiff; and that if he would pay him, he would endeavor to effect title. Defendant then told Cooper he would have nothing to do with the land. It was also proved, that in the summer of 1838, in June or July, Cooper was at the house of defendant to get money on the notes; that defendant told Cooper he was going to Mississippi to get money, and that he would pay the notes when he returned and that Cooper said if he did he would make him a title.

The title of Cooper was a bond from one Collins, from whom he had purchased; on which purchase there was due about one hundred and forty dollars. Collins had obtained judgment for the amount, but could not make the money by execution. Cooper was considered insolvent.

The proof was contradictory, as to whether the defendant took possession of the land after the purchase or not; and also, whether Cooper had exercised ownership over it since that sale.

It was also proved by the plaintiff, that he gave the defendant notice in the summer of 1838, that he had purchased the three notes given by defendant to Cooper, and inquired if defendant had any defence to them or either of them; and that defendant told the witness, by whom the notice was given, that he had none except a set off of between ninety and a hundred dollars; and that he had said the same thing to the plaintiff a few days before, when he was inquiring of him about the notes for the purpose of purchasing them. This conversation was after the one between defendant and Cooper, in which

the former promised to pay all the notes on his return from Mississippi, and the latter agreed, on his doing so, to make title to the land.

It was also proved, that the defendant had never demanded another title bond.

On this testimony, the plaintiff moved the Court to charge the jury—

First: That if, by the condition of the bond, or the sale, Cooper was not to make a title until the 25th of December, 1839, that the defendant Loggins could not, by offering to pay the money before that time, demand a title, and if it was not given, abandon the possession and rescind the contract. This charge the Court refused to give; and charged, that the bond, if not accepted by Loggins, had no force and operation; and that if they believed a new contract had been made, by which Cooper agreed that Loggins should pay the money and he would make title at a particular time, that Loggins had a right to rescind the sale, if Cooper have no title and was insolvent, on offering to pay the purchase money, and title refused according to the last contract.

Second: That if the jury believed that Loggins had been notified that the notes had been assigned to the plaintiff before the demand of the title of Cooper, that then he had no legal right to demand a title of Cooper, until he had paid, or offered to pay, the plaintiff the amount due on the notes; and that an offer to pay the money to Cooper after the notes were assigned to the plaintiff, and the defendant notified of the fact, was not such an offer of payment as would authorize the defendant to demand a title from Cooper.

Third: That if the jury believed from the evidence, that the plaintiff, before the assignment of the notes, informed the defendant that he was about to buy the notes, and inquired whether he had any defence against them, and the defendant said he had none, except a set off for ninety or a hundred dollars, and that the plaintiff purchased the notes on the faith of that declaration, that then the defendant cannot resist the payment of the notes on the ground that Cooper was unable to make title to the land.

Fourth: That in this case, to authorize the defendant to demand a title from Cooper, he was bound to offer to pay the notes to the plaintiff; and that an offer to pay, or tender of the money, to Cooper, was not sufficient to authorize the defendant to demand title from Cooper.

All which charges, the Court refused to give, and the plaintiff excepted.

After the jury had retired, they returned into Court, and inquired if, in this case, the plaintiff stood in the same condition that Cooper would, if the suit had been brought by him; and whether, if the plaintiff bought the notes on the faith of the defendant's declaration, that the notes were good and he had no defence against them, made any difference. And the Court charged the jury, that the defendant was entitled to the same defence against the plaintiff that he would have if the suit had been brought by Cooper.

The jury gave a verdict for the defendant, and judgment was rendered pursuant thereto; from which this writ of error is prosecuted. The assignments of error present the questions of law arising out of the charges given and refused.

PECK and CLARKE, for the plaintiff in error, cited the decision in this case when last here. [1 Ala. Rep. 622; 9 Johns. Rep. 126; 14 *ibid.* 363; 16 *ibid.* 226; 19 *ibid.* 49; 1 Conn. Rep. 345.

CRABB, COCHRAN and LINDSAY, *contra*

ORMOND, J.—The questions of law, which arise out of the charges given and refused by the Court, will be considered in the order they are presented in the record.

1. From the first charge which the Court refused to give, considered in connection with the charge given, it appears that the contest in the Court below was, whether the written contract, supposed to have been entered into by the defendant, was ever consummated so as to be binding on him; and whether the real contract was not a subsequent *parol* contract, entered into between Loggins and Cooper. It is obvious, that this is a question of fact; and, therefore, the Court could only be asked to determine the law hypothetically.

On the supposition that a contract was entered into between the defendant and Cooper, and that it is evidenced by the notes executed by the former, and the title bond to him by the latter, the title could not be demanded by the vendee, until the time stipulated in the bond when the title was to be made; and a tender of the purchase money and demand of title before that period, would not entitle the vendee to a rescission of the contract. This question is not at all affected by the fact, that the title was in another at the time of the tender; as the vendor may acquire it before he can be called on for it. Whether there may not be an exception to this rule where it is impossible for the vendor to obtain the title, it is not necessary now to inquire.

If, on the other hand, the contract between the parties for the sale of the land, was the parol contract supposed to have been entered into in the summer of 1838, then a tender of the purchase money according to its terms, and a refusal to make title, would authorize the vendee to rescind the contract.

2. As a tender of purchase money and demand of title, presupposes a right to receive the money; and as, by the assignment of the notes to the plaintiff by the vendor, of which the defendant had notice, the vendor had deprived himself of the right to receive the purchase money, it follows that a tender to him, under such circumstances, would not authorize a rescission of the contract. The tender, to be available, should have been made to the plaintiff, who, by the assignment, became invested with all the rights of the vendor. Whether, after such demand, he would not be entitled to a reasonable time to obtain the title from the vendors, unless previous notice had been given to him of the intended tender and demand of title, it is not necessary now to determine; as no demand appears to have been made of him.

3. The maker of a note, when applied to by one intending to purchase it, to know if there is any defence against it, by admitting he has none, thereby precludes himself from afterwards setting up any defence, when sued on the note, which existed at that time, within his knowledge, as it would be a fraud on the intended purchaser. But we think he would not be precluded from making a defence which might subsequent-

ly arise out of the original contract; such, for example, as a total failure of the consideration. [See *Buckner v. Stubblefield* and others, 1 Wash. Rep. 386; *ibid.* *Hoomes v. Smock*, 390.] As already remarked, to permit the maker to avail himself of any defence which existed at the time of the application to him for information, would be a deceit; but if the note be purchased on the faith of a *promise*, by the maker, to pay it, he will be compelled to pay the assignee at all events, on the ground of a contract, of which the purchase of the note would be a sufficient consideration. So in this case; if the contract was rescinded after the plaintiff acquired title to the notes, from the inability of the vendor to make title, the defendant being ignorant at the time he was applied to by the plaintiff for information respecting the notes, of the inability of the vendor to make title, the failure of the consideration would be a valid defence against the notes in the hands of the plaintiff.

These views dispose of all the objections taken at the trial in the Court below; and the judgment must be reversed, and the cause remanded for a new trial.

JOHNSON ET AL. v. GLASCOCK ET AL.

1. If a chancellor refuses to proceed according to the mandate of the Supreme Court in a cause in which his decree has been reversed, and the proper decree rendered by the Supreme Court; the proper mode to arrive at the justice of the case, is to require him to proceed by writ of mandamus.
2. A per-emptory writ will not however be issued in the first instance on petition; but only a rule on the Chancellor to shew cause why the writ should not issue.
3. When the direction contained in a mandate of this Court, is precise and unambiguous, it is the duty of the subordinate Court to carry it into execution. And it ought not to decline obedience upon a supposition, that the Court has inadvertently or otherwise committed an error,

MOTION for a rule against the Honorable Alexander Bowie, Chancellor of the Northern Division of the State of Alabama,

to shew cause why a writ of *mandamus* should not issue from this Court, requiring him to proceed according to the decree rendered in this cause at the last term of this Court.

The petition sets out that the complainants moved the Court of Chancery to proceed to take an account and make distribution of the estate of John Johnston, deceased, in conformity with the decree rendered and produced the certificate from the clerk of this Court, directed to the Register of the Court of Chancery, certifying the reversal &c. (*Supra page.*

The Chancellor declined, and made an interlocutory order, which is as follows :

In this cause a motion was submitted, based upon the decision of the Supreme Court, to refer the case to the Master, to ascertain and report, with a view to distribution, the amount &c. of the personal, and the rents and profits of the real, estate. With unfeigned reluctance, I feel constrained to refuse the motion, My respect for the Supreme Court is too profound and sincere, to permit me, captiously, to refuse obedience to any order they may send me. But when they require me to do, what I honestly believe I have no right to do, according to the established principles of the Court over which I preside, I am sure that Court will properly appreciate the motives, which has induced me to decline to do what they have required of me. On an inspection of the prayer of the complainant's bill, it will be seen that it simply asks, that the nuncupative will be set aside, and that the estate real and personal, should be decreed to descend to his heirs and distributees at law. I cannot regard this as a prayer for distribution or account; and as there is no prayer for general relief, it appears to me that the Supreme Court has already done all that the complainants have asked or designed to ask, when the bill was filed. I am confirmed in this opinion, by the fact that the Orphans' Court is established for, and invested with all the powers necessary to collect and distribute estates. While, I presume, it cannot be doubted that this Court has authority, under proper circumstances, to compel distribution of estates ; I think it would be very bad policy to permit it to supersede altogether the established Courts of probate. In the case at bar, the pretended will has been set aside, and the estate of the deceased decreed to descend to his heirs at law

and distributees. Here the bill stops; and here, it appears to me, the jurisdiction of this Court, for the present ought to stop. It is indispensably necessary for the protection of creditors, that administration of estates should be committed to somebody who will be responsible to them. But if this Court undertakes, on the technical notice of a trust, to seize on an estate, when there has been no administration, and to distribute it in a short hand manner, I may be permitted to ask to whom are creditors to look for payment of their demand? Who could they sue? Or shall we say they shall not sue at all? With these views, I do not feel at liberty to order the reference to the Master. The motion to refer, which I refuse to grant is annexed to this opinion. As I before said, I have reluctantly refused this motion. If the Supreme Court, on consideration of the matter, shall think me in error, I shall most cheerfully carry out any order in this cause, they may think proper to make. But, as I presumed, that the order heretofore rendered by that Court, might have been inadvertently made, I felt that it would be the safer course, to refer it once more to them.

The motion appended, seems to have been shown in the form a decretal order, and if allowed would have directed a reference to the Master to state an account. 1. Of what real estate the said John Johnston died, seized, or possessed; and if in possession of Glascock or Wife, by themselves or tenants, then to report the yearly value. 2. To report the number, ages, &c. of the slaves of the deceased, and their yearly value, as well as their respective values. 3. To report what other personal estate or effects of the deceased, have come to the possession of the defendants, including choses in action, money, &c. And that the Master be authorised to examine the defendants on interrogatories, if required by the complainants, and to take the testimony of witnesses, &c., &c.

PECK, for the motion, insisted that the proper remedy in a case like this, is by mandamus, and cited, *Ex parte Crane, et al.*, 8 Peters 193; *Ethridge v. Hall*, 7 Porter 47; *Ex parte Sibbald*, 12 Peters 473.

If, as supposed by the Chancellor, the decree rendered in this Court was inadvertently made, it is too late for correction. (Ex parte Sibbald, 12 Peters 492.)

GOLDTHWAITE, J.—1. There can be no question, we presume, that every Superior tribunal must necessarily possess some means to require obedience to its legitimate mandates, from all subordinate and inferior jurisdictions. Without such means, the relation of superior and subordinate never could be sustained.

The authorities cited on behalf of the motion are conclusive, that in such a case as the petition discloses the writ of *mandamus* must be allowed, if the refusal is persisted in.

2. It is not usual, however, to issue the writ in the first instance on Ex parte statements; the person supposed to be in default, is generally required to show cause why the writ of *mandamus* should not issue; and it is only when no sufficient cause is shown, that the writ follows the rule as a matter of course.

3. The learned Chancellor, when he refused to carry out the mandate of this Court, seems to have been influenced by an impression, that the judgment was not only erroneous, but also, that this Court possesses the power to correct its errors at a subsequent time. It is very certain that, after the Court has adjourned, its judgments, however erroneous, are incapable of revision, except for mere clerical defects and omissions. (Ex parte Sibbald, 12 Peters 492.) As the error, if one has been committed, is remediless, this consequence follows—when the direction contained in the mandate of the superior to the inferior Court is precise and unambiguous, it is the duty of the subordinate tribunal, to carry it into execution. And it ought not to decline obedience upon the supposition, that the superior Court has inadvertently or otherwise committed an error.

The rule to show cause must be allowed on the facts disclosed by the petition.

We are perfectly satisfied, that the Chancellor, in refusing to carry into effect the mandate of this Court, has been conscientiously impressed with the belief, that the Court had fallen into

an error; but a very slight examination must satisfy him that it is *not his* tribunal, which by law is invested with the revising power. And if this Court can, in the present case be directed by him to re-examine its decision, made after a most deliberate investigation, the same may occur in every other case.

Although it is entirely unnecessary to support a mandate which we have no power to recall, it is at all times most satisfactory to us, to be able to show what we consider to be sufficient reasons for the judgment, which we then considered and now believe to be correct.

The answers of all of the defendants, assert that letters of administration with the will annexed, were granted in April, 1834; that the estate was finally settled, and the assets paid over to the widow of the deceased, as his sole legatee, long before the commencement of the suit to set aside the will. It is very improbable therefore, that the rights of any creditors have been or could be impaired. In addition to this, if any special debts exist, binding on the heir, they may yet be sued, if they have assets by descent. If the administrators had in truth, as they aver, finally settled the estate with the Orphan's Court, and paid over the assets under the direction of that Court, to one then supposed to be entitled; it is, to say the least of it, questionable, whether that Court could entertain any further jurisdiction over the subject matter.

The title of the widow of the deceased, to her property, obtained by fair course of settlement with the administrator, could not be impeached or divested by a Court of law, even, if any one of the complainants could make title, except through the administrator. These reasons seemed to us, and yet seem to be conclusive, that the equity of the case could alone be reached by declaring Glasscock and Wife, as trustees, with respect to the property of the decedent, for those entitled to distribution.

The Chancellor seems to be of opinion, that there is no prayer for general relief, and therefore, that relief should have extended no farther than to set aside the will, and leave the parties to get at their rights as they could. It has already been shown, that their rights could only be reached in equity, therefore they were to be informed, that they had not asked for enough; what they had asked for would be given to them, and the remainder of

their rights would be accorded, whenever they filed another bill. But there is no magic in the words, *and for such other and further relief, as may seem agreeable to equity and good conscience.* The prayer of the bill, which is thought to be so constructed as to only authorise the specific relief previously asked for, is in these words, *and that the matters and things in the premises may be heard and determined, on the principles of equity.*

We have thus, with some labor endeavored to remove doubts, which we believe, have been most honestly entertained, but we hope, that hereafter it will not be supposed, that our decisions are inadvertently made.

We may remark further, that we have considered this case solely on the assertions of the petition; if the action of the Court of Chancery was refused on the specific action required by the complainants, it may be questionable, whether the Court of Chancery was not correct in thus refusing. We do not give any opinion on this matter at present, but it will be seen, that the decree only extends to *distribution*, as in case of *intestacy*.

JONES v. YARBOROUGH.

1. Where the question is, whether a negro was sound, at the time the detendant purchased him of the plaintiff, the Court should not charge the jury, that if he had a chronic disease of the chest a few weeks after the purchase, it was scarcely possible, that he was sound at the time of the sale. Such a charge is opposed to the statute, which prohibits the Judges from charging juries "with respect to the matters of fact"
2. Where a defendant pleads in *bar*, he cannot object, on the trial before a jury, that the writ bears test before the cause of action accrued. Such objection is good on plea in abatement.

THE plaintiff brought an action of assumpsit in the Circuit Court of Talladega, on a promissory note, made on the 22d of

November, 1838, for the payment of one hundred and ninety-three dollars and thirty-four cents, by the defendant, on or before the 1st March thereafter.

The writ bears test of the 28th February, 1839, a day previous to the maturity of the note.

On the trial, a bill of exceptions was sealed at the instance of the plaintiff, out of which the questions presented by the assignments of error arise. The consideration of the note was the purchase of a negro man by the defendant of the plaintiff. A physician, whose deposition was taken at the instance of the defendant, testified, that on the 25th December, 1838, he visited the negro in question, and found him laboring under a chronic disease of the chest, and believed he could not ever be sound again.

The Court thereupon charged the jury, that if they believed the negro was laboring under a chronic affection of the chest, as stated in the deposition of the physician, on the 25th December, 1838, then it was scarcely possible that he could have been sound at the time of the sale to Yarborough a few weeks before. *And further*, that although the pleas on which issues were taken to the jury, were all in bar, viz: 1. *Non-assumpsit*. 2. Failure of consideration. 3. Want of consideration—Yet the date of the writ was conclusive to shew, that the action was prematurely brought, and the plaintiff could not recover.

A verdict and judgment being rendered in favor of the defendant, the plaintiff has sued a writ of error to this Court.

Mr. MOORE, for the plaintiff.

Mr. HOPKINS, for the defendant.

COLLIER, C. J.—The Circuit Judge, in his charge to the jury, seems to have supposed, that in order to distinguish a disease as "*chronic*," it is necessary that it should have been of long standing. As applied to diseases of the body, chronic and acute are the antithesis of each other. An acute disease is one usually attended with violent symptoms, promising speedily to attain a crisis; while a chronic disease is deep-rooted and obstinate, threatening a long continuance. Now it

may be true, that it usually requires sometime after a disease has manifested itself, to discover that it is chronic ; yet as the reverse may be, and sometimes is, the case, it was not permissible to instruct the jury, that if the negro in question had a chronic disease of the chest on the 25th December, 1838, that it was scarcely possible that he was sound a few weeks previously when he was sold. Such an instruction is directly opposed to the statute, which inhibits the Judges of the Circuit and County Courts from charging juries with respect to the matters of fact. [Aik. Dig. 283.]

The objection, that the writ bears test of a day before the cause of action accrued, was properly available on plea in abatement ; but it could not arise on the pleas in the record. These pleas are in bar, and admit that the action was regularly brought, merely controverting the plaintiff's right to recover upon the merits of the cause disclosed in his declaration.

The Circuit Court erred in both the points presented by the bill of exceptions. Its judgment is consequently reversed, and the cause remanded.

JONES v. NORRIS, SURVIVING PARTNER, &c.

1. On the trial of an issue, made up on the answer of a garnishee, who claimed to hold certain effects of the defendant in execution, by virtue of a conveyance from him ; proof of what he said at, and previous to the conveyance, for the purpose of impeaching the transaction as fraudulent, is not admissible, unless the declaration were made in the presence of the garnishee.
2. Such illegal evidence cannot be made good by the instruction of the Court to the jury, that it should not prejudice the garnishee.
3. A promissory note or other *chose in action*, cannot be condemned to satisfy the plaintiff's demand.
4. Whether in such a case, garnishment should issue against the persons liable to pay such *choses in action*, or whether a bill in Chancery must be filed for that purpose *quere*.

Error to Coosa Circuit Court.

MORRIS, for the plaintiff in error.

No counsel appeared for the defendant.

ORMOND, J.—The questions of law presented on the record, arise out of an issue to try the truth of an answer made by the plaintiff in error, to a summons of garnishment, issued by the defendant in error, a judgment creditor of one James F. Johns.

The record is exceedingly defective, as it does not contain either the answer of the garnishee, or the issue tendered by the defendant. From the bill of exceptions, it appears, that the answer, among other things, set forth, that various promissory notes were endorsed and assigned to the garnishee, by Johns in consideration of certain liabilities incurred by the garnishee for him. That the defendant in error, proposed to introduce evidence to prove that the assignment and transfer of the notes from Johns to the garnishee, was fraudulent and void, as against the defendant in error. To the introduction of this evidence, the garnishee objected, but the objection was overruled by the Court.

The Court also permitted evidence to go to the jury, consisting of the declarations of Johns, of his intention to transfer his goods, at and previous to the alledged transfer of his effects, to show the intention of Johns, but should not be taken by the jury, to prejudice Jones—to which also, the plaintiff in error objected.

It appears that the garnishee admitted by his answer, that he held notes and other effects of Johns, the defendant in execution, in his hands, which he insisted on his right to retain to discharge certain liabilities of Johns, for which he was bound. The answer in this particular, would be contradicted by proof that the transaction was fraudulent, and evidence tending to that result, would certainly be competent under the issue.

Declarations of Johns, at or previous to the time of the transfer to the garnishee, and in his presence, would certainly be competent evidence to show the intention of the parties in the particular transaction; but the declaration of Johns, either at

or previous to the alledged transfer, could not be binding on the garnishee, unless made in his presence.

We infer that these declarations were not made in the presence of the garnishee, from the attempt, on the part of the Court, to limit the effect of the evidence on the minds of the jury, to the "*intention of Johns*;" and that it should not prejudice Jones—why then, was it permitted to go to the jury? Jones claimed to hold the property as his own to satisfy certain liabilities of Johns, for which he was bound; and it is not easy to conceive how evidence, which went to establish a fraudulent intention in Johns in the transfer, could fail to inculcate the garnishee also. If, however, such a thing were possible, the evidence, unless it showed a participation in the meditated fraud, by the garnishee, was not evidence against *him*, it was at least entirely irrelevant, and on that ground, from its tendency to mislead the jury should have been excluded.

The judgment in this case, is not only for the money, which the garnishee owed the defendant in attachment; but as we understand it, is also rendered for the choses in action, which the jury found to be in the hands of the garnishee. The language, is, "and it is further considered, that the said choses in action be condemned to satisfy the plaintiff's demand." In *Smith v. Champman*, 6 Porter 365, the garnishee admitted an indebtedness in "store accounts," and this Court held, that no judgment could be rendered against the garnishee on such an answer. In *Sims v. Sheffield & Co.*, 1 Ala. Rep. N. S. 134, the Court below had directed a sale of promissory notes, and this Court refused at the instance of the garnishee, to revise the judgment of the Court, as he had voluntarily placed the note in the possession of the Court.

It is very clear however, that the Court cannot direct a sale of a mere chose in action; whether in such a case, it would be necessary to garnishee the maker of the note, or whether resort must be had to a Court of Chancery, it is not necessary now to determine. There are several other questions presented by the assignments of error, which from the state of the record cannot be examined. Let the judgment be reversed and the cause remanded.

HALL v. LAY.

1. The Judges of the County Courts of this State, have no authority to appoint guardians, either for the persons or estates of minors whose fathers are living.
2. Where it appears, from a written memorandum signed by counsel, that they have consented, that a commission to take the testimony of non-resident witnesses, might issue without the names of the commissioners being therein inserted; and the commission is filled up afterwards, no exception can be taken for this irregularity.

Writ of Error to the Circuit Court of Cherokee County.

ACTION of detinue for seven slaves. The defendant pleaded *non-detinet*, and other pleas. Verdict for the defendant and judgment thereon.

In the progress of the trial, a bill of exceptions was taken by the plaintiff, which declares that several questions were made with respect to the admission of the copy of the will of Mary Hall. This copy is certified by one, who styles himself sole judge, and also clerk of one of the Courts of Ordinary of the State of South Carolina.

A particular description of the certificate is unnecessary, as the Court considered the questions, arising out of it, to be the same as those determined in *Huff v. Cox supra*.

The defendant gave in evidence, the exemplification of certain proceedings by the Judge of the County Court of Cherokee County, from which it appears, that the defendant was appointed guardian of certain minor children of the plaintiff. All of these children except one, were more than fourteen years old; and the record of the appointment sets forth, that such of the children as were over that age, desired the Court to appoint the defendant their guardian.

The plaintiff moved the Circuit Court to exclude the depositions of certain witnesses, which were taken by virtue of a commission, which was issued without inserting therein the names of the commissioners, by whom it was afterwards executed and returned. Appended to the commission are inter-

rogatories and cross interrogatories; in the caption of the interrogatories, is the following memorandum: By virtue of authority from the Circuit Court of Cherokee County, and by consent of parties, you will proceed to take the testimony of—naming certain witnesses, to whom you will propound the following interrogatories: At their conclusion is another memorandum in these words, The commissioners, who may take the depositions will please propound the same interrogatories to the other witnesses. These memoranda are signed by the defendant's counsel; and immediately after, follow the plaintiff's cross interrogatories, signed by his counsel. The Circuit Court considered these memoranda as evidence of a consent that the commission should be filled up after it was issued, and refused to exclude the depositions from the jury. The plaintiff excepted to the several matters before mentioned.

He now prosecutes this writ of error, and assigns, that the Circuit Court erred in the several points excepted to.

GOLDTHWAITE, J.—1. It is evident from the constitution of society, that the relation of guardian and ward, must have existed for ages beyond the written history of mankind; and from this, it would seem reasonable to infer, that there could not be much difficulty in ascertaining, at the present time, the precise rules by which this relation is to be governed. But this is so far from being easy, that there is no subject more involved in obscurity; when it becomes necessary to trace this relation a step beyond our statute books. Nor is it so alone with respect to guardian and ward; in the more interesting relation of parent and child, it, at this day, is a question of profound difficulty, whether the father may not be divested of the most necessary means to control his children, and compelled to yield his actual rights to another, whenever his children happen to be invested with an estate.

Neither time, nor the pressing duties which now devolve on us, allow of more than a brief examination of this interesting subject; and that only so far as is immediately connected with the case before us.

If a child is induced to regard any other than his father, as custodian of his property, it is certain that parental influence must

be greatly weakened, if not entirely destroyed; and whatever may be considered as the rule at this day, we cannot doubt there was a period once known to the common law, when the father had the right to the custody and control of his child's estate, in the same manner as he now has of his person. Thus it is said by Lord Coke, if an estate is left to an infant, his father, by the common law, is the guardian, though he must account for the profits. [Coke on Litt. 88.] And this is cited by Blackstone with seeming acquiescence. [1 Black. Comm. 461.] Long before personal property acquired that relative importance it now sustains, the custody of the person, and lands of a male child under fourteen years descended, on the death of the father, to the rest of kin, who could never by any possibility inherit the estate, in the event of the death of the child. [Littleton S. 123; 1 Black. Comm. 461.]

This custodian was termed a guardian in socage, and he stood to the child in *loco parentis*. It would be reasonable to conclude that one from whom a right is derived by descent, must have possessed the powers, which at his death descend to another; in other words, that the father possesses at least, as much power over the person and estate of his child, as a guardian in socage does over that of his ward. But on the contrary of this, we find it frequently stated in the books, that the father, as natural guardian, has no control over the estate of his ward. [May v. Calder, 3 Mass. Rep. 55.) And in Dayley v. Talferry, 1 P. Wms. 285, it was held, that an executor is not discharged from his liability to account to an infant, if he pays the legacy to the father, who proves to be insolvent.

A more reasonable doctrine however, has been held in England, in comparatively recent cases, which declares, that a widow is guardian in socage to her daughters, until they attain the age of fourteen years, of their freehold and copyhold estates; and that she is entitled to elect whether she will let the estate, or occupy it for their benefit. [King v. Oakley, 10 East 490; King v. Wilby, 2 M. & S 504.]

It is not our intention now, to examine how far the doctrine that the father has no authority over the estate of his child, is correct; or when it arose and was engrafted on our law, if, indeed such be the case. It will probably be found to be sus-

tained mainly on the fact, that a Court of equity will sometimes interpose its aid, to prevent the personal estate of an infant, from being squandered, and require the father to give security, to have it forthcoming when the child becomes of age ; but even then, we apprehend, it will be found, when the father has been divested of the custody of the estate, he was unwilling to give the requisite security ; and if the father is unable to give such security, and another is invested with the custody of the estate, we very much doubt, if he has any claims to be considered in the place of a guardian. [See *Ex parte Hopkins*, 3 P. Wms. 152.] If a maintenance is necessary to be allotted to the child, when his estate is held under such circumstances, we think no Chancellor would direct it to be expended, independent of the control of the father, unless indeed, under very peculiar circumstances, not affecting the principle, that the father has the legal right to control his children, whether with or without a separate estate.

Let us examine our statutes, to ascertain how far the common law has been modified.

The act of 1806, Aikin's Digest 220 S. 21, provides, "that the Chief Justice of the Orphan's Court in each County, when and so often as there shall be occasion, is hereby empowered to allow of guardians that shall be chosen by minors of fourteen years of age ; and it shall be lawful for the said Court to appoint guardians for such as shall be within or under that age."

The same section also, authorises the Chief Justice to cite any minor above that age, to appear before him, and choose a guardian; and if he neglect or refuse to appear, or when appearing he refuses to choose a guardian, in every such case, the Orphan's Court shall have the same power to appoint the guardian, as if such minor were under the age of fourteen years.

By another section of the same act, it is provided, that every guardian *in socage*, or other guardian shall within three months after his appointment, make an inventory of the estate of his ward, and shall once in every year exhibit an account ; and, that he may be displaced if he remain in default, or on good and sufficient cause being shown. All these powers are now vested in the Judges of the County Courts.

Although these enactments speak of minors generally, they evidently were never intended to curtail or abridge the natural right of the father; because it is clear they contemplate the custody, by the guardian of the person, as well as of the estate of the ward; hence if they stood alone on the statute book, we should conclude without hesitation, that no power is or was intended to be conferred on the Judges of the County Courts, to appoint guardians to minors whose fathers are living. But if this was even doubtful, the act of 1822, Aikin's Digest 221 S. 10, which authorises the appointment of guardians by the will of the father, amounts to a demonstration, that he is the natural guardian. This act provides, that any father may, although he is not himself of the age of twenty-one years, by his will devise the custody and tuition of his child, who has never been married, (although it be not born,) during the infancy of the child, to whomsoever he will. And this guardian is to have the custody also of the estate of his ward, if he will give the necessary security.

It would be most absurd to imagine that the father is not invested with the power during his life, but that he may devise to *whomsoever he will*, to be executed after his death.

That a Court of Chancery, under some very peculiar circumstances, may interpose to divest the father of this natural right to the custody and control of his children, may be conceded; as it may also be, that the same Court has the power to provide for the security of the infants estate. But that is the only Court on which the law has hitherto conferred this extraordinary power.

The record shows in this case, that the father of the minors for whom a guardian was appointed by the Judge of the County Court, was living and yet living. The counsel of the minors can give no authority to the Court in such a case as this; the Judge had no warrant in the laws of the land, to make any guardian for minors thus circumstanced; his act is simply void, and conferred no authority on the defendant to assume the rights, or perform the duties of a guardian.

On this point, the judgment of the Circuit Court is reversed and the case is remanded.

It is possible that the Judge of the County Court may have been led into this error, by the manner in which the case of Huie v. Nixon, 6 Porter 77 is reported. What is stated in the head note, as the decision of the Court in the opinion, is nothing more than an illustration of the powers of the County Court, over the subject of guardianship.

The question then was, whether the *mother* had a permanent right to the wardship of her child, its father being dead. We then said the assertion of such a right could not be supported, because it would no doubt, be competent for the County Court, to set aside the claim of the father to the wardship of his child's estate in favor of a stranger, when it appeared that the father was unfit for that responsible station. It is apparent now that no such point was decided, as is stated in the note of the case, and the illustration was used incorrectly, we admit, to show that the mother had no such right as was claimed for her.

2. We consider the written memoranda attached to the interrogatories and cross interrogatories, as showing the consent of plaintiff's counsel, that the commissioners should be named and names inserted after the commission was forwarded to be executed. The direction is to the commissioners, who may take the deposition, to do certain acts; if the commission was not intended to be blank as to the names of the commissioners, the direction would probably have been to the commissioners named in the commission. At all events, we feel authorised to presume that the commission was attached to the interrogatories, and that the consent applied to the then condition of it.

The other questions raised by the assignments of error, were decided by this Court at its last term, in the case of Huff v. Cox, *supra*.

Let the judgment be reversed and the cause remanded.

ROEBUCK v. DUPREY.

1. Where an estate of freehold was granted by the words, *dedi et concessi*, or *dedi* only, according to the English common law a *warranty of title* was implied. *Quere*—Does the word, “*give*,” employed in a deed of bargain and sale, import such a warranty in this State.
2. The words, “grant, bargain, sell,” do not, under the 20th section of the act of 1803, “respecting conveyances,” import an absolute or general covenant of seisin, against incumbrances, and for quiet enjoyment; but amount to a covenant only, against acts done or suffered by the grantor and his heirs.
3. That section, in declaring the effect of the words, “grant, bargain, sell,” when employed in a conveyance in fee simple “to the grantor or his heirs,” is evidently misprinted—the term, “*grantor*,” must be construed to mean *grantee*.
4. Although a deed contains express covenants, yet other covenants may be implied; but the latter can only operate where they are consistent with the former.

THE defendant in error declared against the plaintiff, in the Circuit Court of Jefferson, in covenant upon a deed of the following tenor: “To all to whom these presents shall come, greeting. Know ye, that I, George Roebuck, for and in consideration of eight hundred dollars received to my full satisfaction, of John W. Dupuy, of the county of Jefferson and State of Alabama, do give, grant, bargain, sell and confirm, unto the said Dupuy, and to his heirs and assigns, the following described tract or parcel of land, situated in the county aforesaid, in township eighteen, in range three west, viz: the northwest quarter of section one. To have and to hold the above granted and bargained premises, with the appurtenances thereunto belonging, unto him, the said Dupuy, and to his heirs and assigns forever, and to his and their own proper use and behoof; and also, I, the said Roebuck, do, for myself, my heirs and assigns, covenant with the said Dupuy and his heirs and assigns, that at and until the ensealing of these presents, I am well seized of the premises as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same; and furthermore, I, the said Roebuck, do, by these presents, bind myself, my heirs and assigns forever, to warrant and defend the above granted premises unto him, the said Dupuy, and to

his heirs and assigns, against myself, my heirs and assigns, and all and every other person or persons claiming the same or any part thereof. In witness whereof," &c.

The plaintiff then averred, "that the said defendant did then and there, by virtue of the legal operation and effect of the words, grant, bargain and sell, contained in said deed, covenant to and with the said plaintiff, his heirs and assigns, that he, the said defendant, was seized of an indefeasible estate in fee simple in the said premises, freed from incumbrances done, or suffered from the said defendant."

The plaintiff alleges as a breach of covenant, that at the time of the execution of the deed, the "premises were not free from incumbrances done and suffered from the defendant; but that one John Brown, the grantor of the defendant, before that time, to wit: on the first day of March, 1821, by deed duly executed, acknowledged and recorded, had mortgaged the said premises to the Connecticut Asylum for the education and instruction of deaf and dumb persons, *otherwise called* The American Asylum at Hartford, for the education and instruction of the deaf and dumb—for securing the payment of three several notes or bonds obligatory, of even date, with said mortgage, each for the payment of one hundred and ten dollars, payable to Wm. Ely as attorney and agent of the aforesaid Asylum, or his order, with interest from date, at the Huntsville Bank—the first, on or before the first day of March, eighteen hundred and twenty-two; the second, on or before the first day of March, eighteen hundred and twenty-three; and the last, on or before the first day of March, eighteen hundred and twenty-four. Which said notes, or bonds obligatory, together with the interest on the same, were due and unpaid at the date of the said deed from the said defendant to the said plaintiff, as aforesaid; and so continued due and unpaid until the thirty-first day of March, in the year one thousand eight hundred and thirty-eight, when the same were paid and discharged by the said plaintiff. And therefore said plaintiff saith, the said defendant his covenant," &c.

The defendant demurred to the declaration; and his demurrer being overruled, he pleaded four pleas; to the latter of which the plaintiff demurred; and his demurrer was sustained.

These pleas need not be particularly noticed, as they raise the same questions of law that are presented by the demurrer to the declaration.

The cause was then submitted to the jury on the issues of fact; and a verdict being returned for the plaintiff, judgment was rendered accordingly; to reverse which, the defendant has sued a writ of error to this Court.

CRABB & COCHRAN, for the plaintiff in error.

PECK, for the defendant.

COLLIER, C. J.—It was argued for the plaintiff in error, that his demurrer to the declaration should have been sustained by the Circuit Court—

First: Because the word, “give,” does not imply a covenant against incumbrances.

Second: Because the terms, “grant, bargain, sell,” only imply a covenant (if any) against acts done, or suffered by the grantor or his heirs.

Third: That inasmuch as the deed declared on contains express covenants, there can be none implied by law.

First: Until the statute of *quia emptores terrarum* abolished the practice of subinfeudations, lands might be granted to be held, either of the grantor himself, or of the chief lord of the fee. If they were granted by the word, “*dedi*,” to be held of the *grantor himself*, there, without any other warranty, the feoffor and his heirs were bound to warrant the title of the grantee. Such is the declaration of the statute, (De Bigamis, ch. 6.) which, in this respect, Lord Coke says, is merely in affirmance of the common law. The warranty in this instance, was a consequence of the tenure which subsisted between the grantor and the grantee. But where lands were granted to be held of the chief lord of fee, there the tenancy was of the chief lord; still the grantor was supposed to be bound by his own gift; and the word, “give,” imported a warranty by himself personally, but did not extend to his heirs. [Hargraves & Butler’s Notes to Coke upon Littleton, 384; n. a. 2 Hilliard’s Ab. 365.]

Thus stood the case at common law ; and it is unnecessary to inquire what changes were effected by the statute of *quia emptores*, since none of the British statutes are of force *proprio vigore* in this State.

Though the words *dedi et concessi*, or *dedi* only, did make a warranty, when an estate of freehold was granted ; yet the word, *concessi*, or *demisi et concessi*, did not thus operate. [Sheppard's Touchstone 184 ; 2 Hilliard's Ab. 370-1 ; Coke Lit. 384 and note a. ; Rickets v. Dickens, 1 Murphy's Rep. 343 ; 4 Kent's Com. 474 ; Frost v. Raymond, 2 Caine's Rep. 188.] And it has even been doubted in several of the States, whether the word, "*dedi*," at the present day, imports a warranty. [Deakins v. Hollis, 7 Gill & J. Rep. 311 ; Allen v. Sayward, 5 Green.'s Rep. 227.] But it is unnecessary to examine this point further, since it is clear, that the word, "give," does not imply a covenant against incumbrances, &c. ; but at most, a warranty of title, a covenant for the breach of which, the declaration is not at all adapted. The covenant of warranty, (in the language of a learned author,) "looks forward, and in it the grantor covenants, that he will warrant and defend the granted premises, and every part thereof ; and that if the grantee shall be evicted by title paramount, the grantor will indemnify him and make good his loss occasioned by such title." The grantee, therefore, must be so evicted or expelled, before there can be any breach of this covenant ; and, consequently, before any right of action can accrue. (Dane's Ab. ch. 115, A. 8, S. 1 ; Twambly v. Henley, 4 Mass. Rep. 442 ; Mitchell v. Warner, 5 Conn. Rep. 497 ; Clarke v. McAnulty, 3 S. & Rawles' Rep. 364 ; Vanderkarr v. Vanderkarr, 11 Johns. Rep. 122 ; Stewart v. Drake, 4 Hals. Rep. 139 ; Innes v. Agnew, 1 Ham. Rep. 389 ; Simpson v. Hawkins, 1 Dana's Rep. 306. See also 4 Mass. Rep. 352 ; 9 Cow. Rep. 157 ; 15 Pick. Rep. 149 ; 2 Wheat. Rep. 62, note c.

Whether the word "give," employed in a deed of bargain and sale, imports a warranty in this State, is a question not presented by the record, and we consequently decline its decision.

Second: The 20th section of the act of 1803, "respecting conveyances," enacts, that "in all deeds to be recorded in pursuance of this (that) act, whereby any estate of inheritance in

fee simple, shall hereafter be limited to the grantor, or his heirs, the words, grant, bargain, sell, shall be adjudged an express covenant to the grantee, his heirs and assigns, to wit: that the grantor was seized of an indefeasible estate in fee simple, freed from incumbrances, done or suffered from the grantor, (except the rents and services that may be rendered,) as also for quiet enjoyment against the grantor, his heirs and assigns; unless limited in express words contained in such deed: and the grantee, his heirs, executors, administrators and assigns, may in any action assign breaches, as if such covenants were expressly inserted: *Provided always*, That this law shall not extend to leases at rack rent, or to leases not exceeding one and twenty years, where the actual possession goes with the lease." (Aik. Dig. 94.) This section is almost a literal transcript of a law of Pennsylvania enacted in 1715, and that enactment was doubtless suggested by the 30th section of the statute, 6 Ann, ch. 35, to which it is very similar in its terms. [See Lessee of Gratz v. Ewalt, 2 Binney's Rep. 99-100-101.]

The question arising upon the construction of this section is, do the words, "grant, bargain, sell," import an absolute or general covenant of seisin, against incumbrances and for quiet enjoyment; or do they amount to a covenant only, against acts done or suffered by the grantor and his heirs. Though much circumlocution is employed by the Legislature, so as to obscure their meaning; yet we think the most natural interpretation, and the only one that consists with the established rules of construction, requires that the grantor should be held to covenant, that the estate undertaken to be conveyed was indefeasible as to any act of himself. The opposite conclusion can only be attained upon the hypothesis, that the second clause of the section provides for two distinct covenants, viz: 1. That the grantor stipulates with the grantee as against all the world, that "he is seized of an indefeasible estate in fee simple." 2. That he is seized of such an estate freed from incumbrances done or suffered by himself. If this idea were well founded, the second covenant would be wholly inoperative, as it would be embraced by the first, which is much more extensive. But this clause must be regarded as a unit, the latter words limiting and controlling those which precede them.

The fitness of the thing, as well as the punctuation employed, very clearly shew this.

Again: the third clause serves further to shew, that the second must be restricted in the manner we have stated. It is limited in its objects in covenanting "for quiet enjoyment against the grantor, his heirs and assigns." Why thus restrict the covenant for quiet enjoyment, if it was intended by the first part of the second clause to make the words, "grant, bargain, sell," import a general warranty? It would destroy the harmony of the section; but all its parts operate together upon the construction we have given it.

This precise question arose in the case of *Lessee of Gratz v. Ewalt*, 2 Binney's Rep. 95, upon the interpretation of the Pennsylvania statute. In that case, the Court held, that words, "grant, bargain, sell," did not, under the act of that State, amount to a general warranty, but merely to a covenant that the grantor has not done any act, nor created any incumbrance, whereby the estate granted by him may be defeated.

But it is argued by the defendant in error, that the case of *Lessee of Gratz v. Ewalt* has been overruled by the later decision of *Funk v. the Ex'rs. of Bechtoll*, 11 Sergt. & R. Rep. 109. In that case, the land conveyed, had been incumbered previous to the sale, by the grantor, the defendant's testator; and one of the questions raised was, whether the words, "grant, bargain and sell," contained in the deed, were inconsistent with, or restrained by, an express covenant of special warranty. In considering this question, the learned Judge, who delivered the opinion of the Court, said: "The special covenant is by no means inconsistent with this general covenant. The implied covenant is not controlled by the special one—the effect of the words, "grant, bargain and sell," can only be limited "by express words contained in the deed." Such is the direct provision of the act. There is no express limitation; and to imply one, would be contrary to natural justice, and the intention of the parties. It is an unqualified covenant against incumbrances done and suffered by the grantor, or those under whom he claims; nor can it make any difference, that the mortgage was recorded, and the plaintiff had constructive notice," at the time he received the deed,

that the estate conveyed was thus incumbered. We are at a loss in what manner to understand this language. Though it seems to lay down the law differently from what it was ascertained to be in the case cited from Binney; yet as no reference is made to that case, in which the construction of the statute is elaborately examined by three very eminent Judges, we cannot believe that it was intended to overrule it. And this conclusion is strengthened by a note, which we have seen, of *Seitzinger v. Weaver*, 1 Rawle's Rep. 377. See 1 Metc. & P's. Dig. 677, sec. 70. Mr. Hilliard, in his abridgement of the law of real property, cites that case, as also *Lessee of Gratz v. Ewalt*, to show, that under the act of Pennsylvania the words, "*grant, bargain, sell*," do not create a general warranty, but only a covenant against the acts of the grantor himself. (2 vol. 371.) The case itself is not accessible to us.

Chancellor Kent cites, with approbation, the case of *Lessee of Gratz v. Ewalt*, which he considers as furnishing a correct exposition, not only of the Pennsylvania, but of our own statute also. He says: "Upon this construction, the words of the statute are divested of all dangerous tendency; and they amount to no more than did the provision in the English statute of 6 Anne, c. 35, s. 30, upon the same words. It may not be very inconvenient, that those granting words should imply a covenant against the secret acts of the grantor; but beyond that point, there is great danger of imposition upon the ignorant and the unwary, if any covenant be implied that is not stipulated in clear and precise terms. (4 vol. Com.)

We have not thought it deserving serious consideration, whether the effect given to the words, "*grant, bargain, sell*," by the first clause of the section, apply only to a case in which a fee simple estate "shall be limited to the *grantor*, or his heirs." A reference to the statutes of Pennsylvania and Delaware, as well as the British statute already referred to, clearly indicate that the word, "*grantor*," has by mistake been printed for "*grantee*;" and to give effect to the legislative will, we must construe the section as if the latter word was there.

Third: In respect to the last point made, we do not think it well taken. It cannot be admitted, that there can be no covenants in law, or implied covenants, in a deed which contains

express covenants. There may be implied, as well as expressed covenants in the same deed; but the former can only operate where they are consistent with the latter. (*Gates v. Caldwell's ex'rs.*, 7 Mass. Rep. 68; *Kent v. Welch*, 7 Johns. Rep. 258; *Blair v. Hardin*, 1 Marsh. Rep. 232.; *Sumner v. Williams*, 8 Mass. Rep. 201; *Vanderkarr v. Vanderkarr*, 11 John. Rep. 122.) But it is unnecessary to consider whether, in the case before us, the covenants of both descriptions can have their full effect and operation; since it has been shown, that the declaration is fatally defective upon the first and second grounds urged by the plaintiff in error. We need not inquire, whether the Circuit Court rightfully sustained the demurrer to the pleas, as the demurrer to the declaration brings up the same question of law.

We have only to add, that the judgment of the Circuit Court is reversed; and the cause remanded, if desired by the defendant in error.

CARAWAY v. WALLACE ET ALS.

1. A contract, absolute in its inception, and consummated by delivery of the property, will not be converted into a conditional sale, by an ambiguous phrase afterwards endorsed on it, even if such would have been its effect if a part of the original contract.
2. C. sold to W. certain slaves on credit, and delivered them; and sometime afterwards an agreement was entered into, and endorsed on the contract, by which it was stipulated, that payment should be made within the next month, in the notes of other persons; at which time, a *bill of sale of the slaves* was to be executed by the vendor. *Held*—That this was not sufficient to show that the parties intended to rescind the former sale, and convert it into a conditional one.
3. Where a Court of law can afford adequate relief, Chancery has no jurisdiction.

Error to the Chancery Court at Mobile.

THE bill charges, that on the 27th December, 1836, the complainant entered into a contract with the defendant Wallace,

in writing, for the sale to him, of twenty-seven slaves, for the sum of twenty-nine thousand dollars; and by a subsequent verbal agreement, another slave was added, at the price of twelve hundred dollars, upon the same time, to be paid for as follows: one-half of one-third part in ninety days; one-half of one-third part in four months; and the remaining two-thirds in equal payments, of one and two years, to be computed from the 15th January, 1837. That at the time the agreement was entered into, it was contemplated by the parties that it would be carried into full effect on the 15th January, 1837—That Wallace, at that time, alledged he was unprepared to execute the agreement in full by securing the payment of the purchase money; but gave his own notes for the two first instalments, and agreed to complete the arrangement in some short time—That thereupon it was agreed between the parties, that the said Wallace should take possession of the negro slaves, with the understanding and upon the condition, that no title was to pass to him for the same, until he had fully secured the amount still due of the purchase money. About this time complainant received from Wallace two notes, on one S. Andrews of Mobile, amounting in the aggregate to five thousand five hundred and seventeen dollars and thirteen cents. That the matter stood thus, until the 17th February, 1837, when Wallace, being still unprepared to fulfil his agreement, a supplemental agreement was annexed to the original article, to the following effect: "It is understood and agreed by the parties to the within contract, that the amount now due said Caraway, shall be paid to him within the next month in James S. Deas' note, due July 30th, 1838, for four thousand and thirty-six dollars; his note, due July 30th, 1839, for three thousand two hundred and ninety-nine dollars and thirty-seven cents; T. B. Lee's two notes, one due July 30th, 1838, for three thousand nine hundred and fourteen dollars and fifteen cents, and the other due July 30th, 1839, for four thousand two hundred and twenty-two dollars and two cents; at which time a bill of sale is to be executed to said Wallace by said Caraway." That about the time of the expiration of the month of March after, he repeatedly applied to Wallace to comply with the terms of his agreement.

The bill then charges, that the defendants, Sayre & Converse, having notice of the contract aforesaid, and with knowledge that Wallace was about to become insolvent, procured him to execute a deed of trust to one John A. Campbell, upon a part of the negroes aforesaid, and caused them to be lodged in jail in Mobile. The bill further charges, that the complainant has reason to apprehend that the negroes will be removed beyond the limits of this State; and prays that the slaves be delivered up to him; and for a decree against Wallace for the amount due on the contract for the sale of the slaves. An order was made, that a writ issue to the sheriff to take possession of the slaves, &c.

Sayre & Converse, and Campbell, the trustee, by their answers, deny all knowledge of the conditional sale recited in the bill, or that the complainant had any right or title to them—That they claim the negroes under a deed of trust made to Campbell for their benefit, to secure a debt due from Wallace to them, for cash advanced to him on cotton to be delivered to them—That they intended to sell the negroes in pursuance of the terms of the deed; and from distrust of Wallace, placed the negroes in the jail of Mobile county for safe keeping. They deny any intention of removing the slaves beyond the limits of the State; and demur to the bill for want of Equity.

The deed of trust, which is made an exhibit to the answer, is dated on the 1st April, 1837; and is made to secure the payment, by William Wallace and Joseph Wallace, to Sayre, Converse & Co., of a promissory note, dated the 1st April, 1837, and due thirty days after date, for the sum of seventeen thousand five hundred and nineteen dollars and seventy-five cents. The property conveyed consists of twenty-two negro slaves, besides real estate, and promissory notes of other persons. The deed was only executed by William Wallace and John A. Campbell, and proved to have been executed by Wallace before a notary public.

The bill was taken as confessed as to Wallace.

The agreement between the complainant and Wallace for the sale of the slaves, is to the following effect: "Articles of agreement, this day made and entered into, between G. E. Caraway and William Wallace, both of the city of Mobile.

Witnesseth : That the said Caraway has this day sold to the said Wallace the following twenty-seven negro slaves, to wit, &c. for the sum of twenty-nine thousand dollars, to be paid as follows : one-half of one-third of said sum in ninety days ; one-half of one-third in four months ; and the remaining two-thirds in equal payments of one and two years—said payments to be computed from the delivery of said negroes—said Caraway to deliver said negroes by the 15th January ensuing. Mobile, December 27, 1836. Signed, W. WALLACE."

On which is endorsed: "Rec'd, Mobile, January 14th, 1837, of William Wallace, his two notes of five thousand and sixty-six dollars and sixty-six cents each, at ninety days, and four months, on account of the within contract. The balance to be closed when called on.

W. WALLACE,

G. E. CARAWAY."

Also the following : "February 17th, 1837. It is understood and agreed by the parties to the within contract, that the amount now due said Caraway shall be paid to him within the next month in Jas. Deas' note, due July 30th, 1838, for four thousand and thirty-six dollars ; his note, due July 30th, 1839, for three thousand two hundred and ninety-nine dollars and thirty-seven cents ; J. B. Lee's two notes, one due July 30th, 1838, for three thousand nine hundred and fourteen dollars and forty-five cents, and the other due July 30th, 1839, for four thousand two hundred and twenty-two dollars and two cents ; at which time, a bill of sale for said negroes is to be executed to said Wallace by said Caraway.

Signed, W. WALLACE."

There is an agreement on the record, admitting that these agreements between Wallace and Caraway, were made at the time of their respective dates ; that they are to be taken as exhibits to the bill, and as duly proved, that the slaves claimed by the trustee are the same as those specified in the said agreement, so far as the number extends ; that they were the property of Caraway at and previous to the making of the first agreement ; and that Wallace has become insolvent.

There was no evidence taken by the complainant.

The defendants proved, that the debt, to secure which the deed was made, was due from Wallace for advances made on

cotton, which was not delivered ; and also, proved the value of the slaves, the value of their hire, &c.

A decree was entered, dismissing the bill, in the following words : "This case was taken as confessed as to the defendant Wallace ; and came on to be heard on the bill, answer and depositions. Mr. Stewart for the complainant, and Mr. Campbell for the defendants. After the argument, and deliberation had by the Court, the Court is of opinion, that the bill be dismissed. It is therefore considered by the Court, that the bill be dismissed, and that the defendants recover of the complainant the costs. And it is further ordered and decreed, that it be referred to the Master to ascertain the value of the said slaves ; and who are the securities to the forthcoming bond ; and the amounts which the defendants are entitled to recover against the said complainant and his securities, in the event the said slaves are not delivered according to the condition of said bond. And that he report thereon."

At the fall term, 1839, of the Court, his honor Chancellor Peck made a decree, that the slaves mentioned in the replevin bond, executed by the complainants, be delivered to Sayre, Converse & Co., on demand made by them ; that on failure to deliver them, the bond should be held forfeited ; and that the defendants might proceed thereon at law.

At the fall term, 1840, his honor Chancellor Bowie presiding, a decree was made, that the decree made by Chancellor Peck at the fall term, 1839, of this Court, be entered as the decree of this Court.

From this decree, the complainant prosecutes this writ of error ; and assign for error—

1. The Court erred in dismissing the bill.
2. The Court erred in dismissing the bill upon the bill, answers and depositions.
3. The Court erred in rendering a decree in favor of Wallace.
4. The Court erred in rendering the decree made at the spring term, 1839, dismissing the bill and ordering a reference.
5. The Court erred in rendering the decree, or order, made at the fall term, 1839.

6. The Court erred in rendering the decree of the fall term, 1840.

STEWART & DUNN, for the plaintiff in error, insisted that the sale of the slaves was not absolute, but conditional; and that no property in the slaves passed to Wallace by the delivery; and that Sayre, Converse & Co., are not *bona fide* purchasers for a valuable consideration; as they received the negroes as collateral security for the payment of an antecedent debt; and cited 2 Kent's Com. 291; 4 Mass. Rep. 405; 17 ib. 606; 2 Pickering 512; 22 Wendell 659; 1 Paige 312; 6 Johns. C. Rep. 437; 10 Wendell 85; 4 Paige 215; 4 Dana 211; 10 Johns. 66; 10 Mass. Rep. 31; 13 ib. 156; 6 ib. 606; 13 Johns. 434; 3 East. 93; 6 Johns. C. Rep. 437; 19 Vesey, Jr. 235; 4 Mason 289; 4 Wash. C. C. Rep. 588; 3 Serg. & Rawle 20; 2 Pickering 512; 20 Johns. 637; 12 Wendell 593.

Mr. CAMPBELL, contra, argued, that the delivery of the slaves was absolute; but that if they were delivered on a condition, as they were permitted to remain with Wallace after a breach of the condition, that the equity of the defendants was superior to that of the plaintiff; and cited 2 Paige 169; same case, 7 Wendell 77; 6 Cowen 110; 2 Mason 236; 6 Pickering 262; 4 Mass. 405; 10 Wendell 85; 12 ib. 593; 14 ib. 575; 9 ib. 170; 10 ib. 85; 13 ib. 570-605; 2 Wheaton 66; 2 Peters 176; 6 Connecticut N. S. 338; 1 Ch. Cases 35; 5 Leigh 147; 5 Eng. Exchequer Rep. 266; 10 Price 766; 7 Vesey, Jr. 293; 2 ib. 164; 4 Johns. C. Rep. 546; 3 Munford 29; 4 Paige 215; 1 Hall 562.

ORMOND, J.—The material questions in this case are—

1. What was the character of the sale of the slaves in controversy, from the plaintiff in error to Wallace—was it an absolute, or conditional, sale?

2. Are Sayre & Converse *bona fide* purchasers from Wallace, and as such, entitled to hold the slaves against the supposed title, or *lien*, of the plaintiff in error.

1. The contract between Wallace and the plaintiff in error for the slaves, was made on the 27th December, 1836; and is to the following effect: "Articles of agreement, this day enter-

ed into, by and between G. E. Caraway and William Wallace, both of the city of Mobile—Witnesseth: that the said Caraway has this day sold to the said Wallace the following twenty-seven negro slaves: Jim, &c., &c., for the sum of twenty-nine thousand dollars, to be paid as follows: one-half of one-third of said sum in ninety days; one-half of one-third in four months; and the remaining two-thirds in equal payments of one and two years, said payments to be computed from the delivery of said negroes. Said Caraway to deliver said negroes by the 15th of January ensuing.

Signed, "W. WALLACE."

Upon this agreement is an endorsement, dated 14th January, 1837: "Received of William Wallace his two notes for five thousand and sixty-six dollars and sixty-six cents each, at ninety days and four months, on account of the within contract; the balance to be closed when called on.

Signed, "W. WALLACE,

G. E. CARAWAY."

It is not necessary to enter upon the inquiry, what the rights of the parties were under this contract, if either had refused to perform it; as the slaves were delivered pursuant to its terms. It does not appear from the contract, that it was intended that Wallace should execute his notes for the several instalments of the debt. Such was, however, perhaps the intention of the parties; as we find that, on the delivery of the slaves within the time stipulated, Wallace executed his notes for the two first payments, and agreed to execute the residue when called on.

This, there can be doubt, was an absolute, unconditional sale of the slaves to Wallace, and vested in him the entire property. It was simply a sale of the slaves on a credit, which was consummated by a delivery, unclogged by any condition, verbal or written; and vested Wallace with the absolute title in the absence of fraud, which is not shown, and does not appear to have existed, as fully as if the entire purchase money had been paid at the time of the purchase.

It was, however, earnestly contended by the learned counsel for the plaintiff in error, that there was, in effect, a rescission of this contract by the agreement of the parties; and that Wallace agreed to receive the slaves on condition of paying for

them in the mode prescribed; and that until such payment, the title should remain in Caraway. The agreement, from which these consequences are supposed to flow, was made on the 17th February, 1837, and endorsed on the original contract. It is as follows: "It is understood and agreed by the parties to the original contract, that the amount now due said Caraway shall be paid to him within the next month, in Jas. Deas' note, due July 30th, 1838, for four thousand and thirty-six dollars; his note, due July 30th, 1839, for three thousand two hundred and ninety-nine dollars and thirty-nine cents; J. B. Lees' two notes, one due July 30th, 1838, for three thousand nine hundred and fourteen dollars and forty-five cents, and the other due July 30th, 1839, for four thousand two hundred and twenty-two dollars and two cents; *at which time a bill of sale for said negroes, is to be executed to said Wallace by said Caraway.* Signed, W. WALLACE."

It is perfectly well established, that where there is a condition precedent attached to a sale, either expressly agreed on, or understood from the usage of trade, the title will not pass until the condition is performed, unless there be an express or implied waiver of its performance by the vendor. (Kent's Com. 1 ed. 391; Haggerty v. Palmer, 6 Johns. C. 437; Lupin v. Marie, 2 Paige 172; 1 Paige 312; 17 Mass. 606; 4 ib. 405. As to the general principle, there is not, and cannot be, any controversy; but as the question is one of intention, the fact whether the vendor *intended* to part with the title of his property before the performance of the condition, or whether he intended to rely on the faith and honor of the vendee for its performance, is frequently one of great difficulty.

It is conceded in this case, that a bill of sale was not necessary to perfect the title of Wallace in the slaves; yet it is contended, that the question being one of intention, any fact which ascertains that intention, no matter how unimportant or unnecessary it may be, will be effectual. Conceding this to be correct, what is the fact in this case?

The parties, as we have seen, had, in the first instance, made a contract, which contemplated the transfer of the property absolutely to Wallace; that this contract was executed by a delivery of the slaves. A little more than one month after-

wards, a memorandum was endorsed on the contract, the whole object of which appears to have been to change the mode of payment, by substituting the notes of other persons for those of Wallace, within a specific time; and at the close is added, at which time *a bill of sale for the negroes shall be executed*. We cannot think these words potent enough to authorize us to infer, that the parties intended thereby to rescind the contract formerly made, and to change its character from an absolute to a conditional sale of the property, even conceding that such would have been their effect if embodied in the original contract. It must be borne in mind, that the vendor was willing, in the first instance, to invest Wallace with the absolute title, and trust to his ability to pay the purchase money without surety, although the last payment was postponed for two years. That he was in possession of the slaves for more than two months, at any moment during which time, he could have sold them and transferred the title; and that there is no evidence that any reason existed for distrusting the ability of Wallace to pay at this time, which did not exist in January, when the slaves were delivered. In proof of the estimation of Wallace by the mercantile community, as to credit, we find that as late as the 22d and 25th March afterwards, Sayre & Converse advanced to him the sum of twenty-seven thousand dollars on cotton to be afterwards delivered. There is, therefore, no reason shown, why the plaintiff wished to change the character of the contract so as to re-invest him with the title, as must have been done if the contract was changed from an absolute to a conditional one. Nor is it probable that, if such had been the intention, it would have been left to the doubtful interpretation of an ambiguous phrase. The natural course in such a case, if any thing had occurred to alarm the fears of the plaintiff as to the solvency of Wallace, would have been to place the matter beyond doubt, by obtaining from Wallace an explicit declaration to that effect. Courts of justice always endeavor to give effect to the intention of parties to a contract; and the natural presumption, in a case like the present, should be, that the title was parted with; as third persons have no means of divining the secret, unexpressed conditions of a contract, whilst the person in possession, by the apparent owner-

ship, acquires a false credit. It is said by Mr. Senator Tracy, in the case of the People v. Haynes, 14 Wendell 566, that to constitute a conditional delivery, the condition should be express. The case of Hussey v. Thornton, 4 Mass. 405, affirms this principle. A quantity of candles had been sold, but doubting the ability of the vendee, the vendor said they would not be delivered without an endorser or security. They were, however, delivered without insisting on the condition, from forgetfulness; but before they were put on board of the vessel, the vendor informed the agent of the vendee, that he should not consider the candles sold until the security was given; and he received them on this condition. Chief Justice Parsons, in delivering the opinion of the Court, held that the vendor was bound to recollect the condition; and that, had the demands of the creditors originated while the goods were in the possession of the vendees, so that it might be fairly presumed that a false credit was given him—or had the vendee sold them, *bona fide*, and for a valuable consideration, the purchaser would have acquired a good title. This is an explicit decision to the point; for if a condition could be implied from the circumstances, it would have arisen in this case. For we find, that although at the time of the sale, a condition was stipulated, yet as the goods were afterwards delivered without exacting its performance, this was held to be a waiver. See also Furriss v. Hone, 8th Wendell 247. The same doctrine is explicitly held in the case of Chapman v. Lathrop, 6 Cowen 110; and see also the note of Judge Cowen to that case, in which the cases of Palmer v. Hand, 13 Johnson 434, and Haggerty v. Palmer, 6 Johns. Chan. 437, are questioned, and are, in effect overruled by the case of Chapman v. Lathrop. See also the case of Conyers and others v. Ennis and others, 2 Mason 236.

It therefore devolves on a party setting up such a claim, to show, beyond a reasonable doubt, that when he parted with the possession of his property, he did not intend to part with the title; and as the only clue to the supposed intention in this case, is the ambiguous clause relating to the bill of sale to be afterwards made, we do not think that alone, unaccompanied as it is by any other circumstance, sufficient to convert a sale which, in its inception, and for the space of a month or more, was

clearly absolute, into one made on condition. During all the time that Wallace was the undisputed owner of the slaves, he acquired a credit thereby; and it would be of most disastrous consequences to hold, that a sale, made under such circumstances, and attended by such results, could be rescinded, and the title re-invested in the original owner, by a secret, ambiguous phrase endorsed on the contract, which the parties might suppress or make known at their pleasure—the possession in the meantime unchanged, and the public without any means of knowing that the title was not where it appeared to be.

For these reasons, we are of opinion that the sale to Wallace was absolute and unconditional; and that he had the right to sell or dispose of the slaves in any manner he thought proper.

This being the case, it is unnecessary to consider the question, so elaborately and ably argued at the bar, whether Sayre & Converse, having taken the conveyance to secure the payment of an existing debt, could be considered as *bona fide* purchasers for a valuable consideration; as that question could only arise on the supposition, that the plaintiff had an equitable lien on the slaves for the purchase money.

It also disposes of the objection, that the bill should not have been dismissed as to Wallace. The sale being an absolute one, and Wallace merely the debtor of the complainant, without the reservation of any lien upon the slaves, the claim was merely legal in its character; and nothing is shown in the bill which could give a Court of Chancery jurisdiction. The allegations of the bill, besides those which alledge those facts from which the equitable lien is suppose to arise, are that the defendants intended to have removed the slaves secretly and clandestinely beyond the jurisdiction of the Court; and pray the issuance of the writ of sequestration; which prayer was granted by the Circuit Judge.

The proper office of the writ of *sequestration*, is to compel an appearance after service of process, or to compel obedience to the mandates of the Court, by sequestering his property. Here, however, the party was not in contempt, and there was no pretext for the seizure of the slaves, but upon the supposition that the complainant had title to them or an equitable lien on them for his purchase money. In such a case, Chancery

could, doubtless, on a proper shewing, interpose, and by its process, prevent the property from being carried beyond the jurisdiction of the Court, before its action could be had upon it.

In this case, however, the claim was purely legal in its character, and no reason is shown why an attachment at law would not have been effectual. We are therefore of opinion, that the bill was correctly dismissed as to Wallace, as well as the rest of the defendants.

At the hearing, the Chancellor directed a reference to the Master to ascertain the value of the slaves, and who were the sureties to the forthcoming bonds; also the amount which the defendant was entitled to recover of the complainant and his sureties, in the event the slaves were not delivered according to the condition of the forthcoming bond.

At the next term of the Court, which was held by Chancellor Peck, the Master made his report, which the Chancellor set aside, on the ground that it contained no fact material to the disposition of the cause; and decreed that certain slaves, naming them, be delivered to the defendants on demand; and that, upon a failure to comply with the order, the bonds be declared forfeited; and that the defendants have leave to proceed on the same at law.

This decree was again made, and entered in the same words by Chancellor Bowie, at the succeeding term. It is not necessary now to inquire into the reference to the Master, as his report was set aside. It was certainly not error in the Chancellor to declare the forthcoming bonds forfeited upon a breach of the condition, as that was merely the legal result of the fact upon the dismissal of the bill; nor was there error in permitting the defendants to sue at law for a breach of the condition of the bonds.

Indeed, it would seem, that there could be but little doubt that, as the slaves were taken from the possession of the defendants by the *fiat* of the Chancellor at the prayer of the complainant in this suit, the Court have compelled the restoration of the slaves, or their value and the value of their hire, without turning the injured party round to seek redress in another Court. Thus we have held that, where the Court directs a sale of land, it may put the purchaser in possession, and will not drive him

to an action of ejectment. But if this is an error, it is one of which the plaintiff in error cannot complain.

It has been previously held by this Court, that the Court held by Chancellor Peck, when the order made by him in this cause was made, was not a term recognized by law ; and that a decree then made would be reversed on error for that cause. But if the decree made by him in this cause, be conceded to be a nullity, it would not avail the plaintiff in error ; as the same decree was made by Chancellor Bowie at a regular term, which will operate *proprio vigore*, and without reference to the former decree.

Finally : It was insisted that there was no proof in the record of the deed of trust, on which the defendants claim title to the slaves. The deed which we find recited in the answer, is sent up with the record, and as part of it ; and appears to have been proved before a Notary Public. The proof of an instrument like this cannot be made before a Notary, so as to dispense with the proof of its execution, and entitle it to be read in evidence in a Court of justice, without further proof ; but we think its existence is alledged in the bill in such a manner as to dispense with the proof of its execution. It is alledged in the bill, that the defendants claim by virtue of a deed of trust made by Wallace to Campbell as trustee ; and that the trustee, by virtue of the conveyance, has taken possession of the slaves. In the answers of both Sayre & Converse and the trustee, the deed is set forth and relied on, and is found in the record. It was obviously acted on in the Court below, and, so far as we can judge without objection on this score. To permit the plaintiff now to insist that the deed has not been proved, would be a surprise on the defendants, as the fact of its execution was not attempted to be put in issue.

The debt due from Wallace to Sayre & Converse, is fully proved by the deposition of Pritchard.

It results from this examination, that there is no error in the decree of the Court below ; and it is therefore affirmed, with costs.

SIMS v. CANFIELD, EX'R. OF JOHNSON.

1. The distinction between a pledge and a mortgage of personal estate is, that in the former, the title is retained by the pledgor; but in the latter, it passes to the mortgagee, subject to be divested if the condition of the mortgage is performed.
2. It is yet an open question in this State, whether the mortgagor, after a default in the condition of the mortgage, can divest the legal title of the mortgagee then in actual possession, so as to entitle the former to maintain trover or detinue against the latter.
3. But if it is admitted that trover or detinue, under such circumstances, will lie, Chancery, notwithstanding, has jurisdiction of a bill filed by the mortgagor to redeem a mortgaged slave.
4. In defence of a bill to redeem, it is not necessary for the defendant to plead or insist on the statute of limitations, if the complainant in his bill, or by evidence in support of it, shews that he has no subsisting title.
5. When slaves have been passed under a claim of title for a period analogous to the statute of limitations, the possession operates not only as a bar, but also invests the possessor with the absolute property.
6. The action of detinue is the only one at law analogous to a bill to redeem a specific chattel; and so far as the statute of limitations can have any bearing on such a bill, it is to be considered precisely as if it was an action of detinue at law.
7. The act of 1806, [Digest 152, s. 2,] which provides that no action shall be commenced against an executor or administrator, in such capacity, until after the expiration of six months from the grant of administration, has no application to the action of detinue; as such an action cannot be instituted against an executor or administrator in his representative capacity.
8. It is questionable whether the act of 1806, (Digest 152, s. 2,) was intended to apply to any suit in equity. But Courts of Equity are governed by its analogies in the same manner as by statutes of limitations.
9. A bill shows the mortgage of a slave the 29th June, 1839, to secure a sum of money to be paid in two months. The mortgagee took peaceable possession of the slave in October of the same year, and held it under claim of title until his death, when it passed to his executor, and they together held it for more than six years previous to suit commenced. *Held*, that the claim of the mortgagor was extinguished by lapse of time; and that the title of the mortgagee had become indefeasible.
10. When possession of the mortgaged slave is retained by the mortgagor until the default in the condition, the statute does not commence running until the mortgagee acquires actual possession of the slave.

Writ of error to the Court of Chancery of the Third District of the Southern Division.

BILL to redeem a slave mortgaged by the complainant Sims to the defendant's testator.

The bill charges, that the complainant, in June, 1829, borrowed one hundred and sixty dollars from the defendant's testator, which was to be paid at a certain period, which is left blank in the bill. A bill of sale, absolute in its terms, was executed by the complainant; but, as he charges, it was understood by both parties to be intended merely as a mortgage to secure the payment of the borrowed sum; and the slave was to remain with the complainant until default of payment. The bill of sale bears date the 29th June, 1829. Soon after the execution of the bill of sale, the defendant's testator insisted that his title to the slave would become absolute if the money was not paid at the day appointed. The complainant did not pay the money at that time, or deliver the slave; and the defendant's testator soon afterwards took possession of the slave in a peaceable manner. The complainant asserts that he, sometime afterwards, tendered the sum borrowed to the defendant's testator, and demanded the slave, which was not returned, on the pretence that the money was not paid on the day it became due; and the defendant's testator continued in possession of her until the time of his death, converting the profits of her labor to his own use, without rendering any account thereof to the complainant. The bill also charges that the defendant's testator died, having first made and published his last will, by which he appointed the defendant and others his executors, who have been duly qualified as such, and have ever since, as executors, retained the possession of the slave. The bill prays an arrest, &c., and that the complainant may be permitted to redeem the slave out of the value of her labor, and that the remainder may be paid over to the complainant. The bill also contains the usual prayer for general relief.

The subpœna was issued on the 13th day of August, 1836, and recites that the bill was filed on the 3rd day of March of the same year. The bill prays process returnable to the first Monday of March; but there is no memorandum or other evidence in the record, to show when it was filed other than is stated in the subpœna.

The answer of the defendant admits his appointment and

qualification as sole executor, and his possession, in that character, of the slave. It also denies all personal knowledge of the allegations of the bill, except so far as they are sustained by the bill of sale, which is insisted on, as absolute in its terms, and evidencing a sale. It denies all knowledge of any attempt by the complainant to regain the possession of the slave; and insists that his testator was in possession of her four years previous to his death; and that he, the defendant, has been in possession, as executor, for three years together, making seven years that the complainant has omitted to press his claims. This, however, is neither pleaded in bar, nor formally insisted on, as a defence, except so far as it asserts a *bona fide* title to the slave.

Several witnesses were examined by the complainant, one of whom is the subscribing witness to the bill of sale. This witness states that the bill of sale was read to the complainant, who objected to its terms as conveying the absolute title to the slave, when a mortgage only was intended; but executed it on being assured by the defendant's testator that it should only operate as a mortgage; and if the money was repaid then the title would be determined. This witness also proves, that the defendant's testator went to the house of the complainant and forcibly took the slave soon after the expiration of the time for which the money was loaned. The money was to be repaid in two months. The time is not stated at which the slave was taken possession of by the defendant's testator.

Another witness proves that a tender of the sum due was made in the fall or winter of 1829, and the defendant's testator then refused to receive the money and surrender the slave, on the ground that the money had not been paid to him at the day; and he then declared that he would not give up the slave until compelled to do so by law. This witness does not state the time of the tender with certainty; but the previous witness says it was made about the 1st of October, 1829, as he was informed by the defendant's testator.

A witness examined on behalf the defendant, says he was present at a conversation which he believes took place in August or September, 1839, between the complainant and the defendant's testator, in which the former offered to sell the slave,

now the subject of this controversy; and it was agreed that the latter should advance a sum of money; and if the former did not return it at the day agreed on, he was to make a bill of sale of the slave in satisfaction of the debt. After this, he heard the complainant say to the defendant's testator, that he had been unable to obtain the money to repay him; and he considered the slave to belong to the latter according to the agreement—That he was willing to make him a bill of sale at any time when called on; but as his wife was unwilling to part with the girl, he wished to hire her for two or three months, believing in that time his wife would be reconciled to the arrangement. The witness thinks that the slave was then in the possession of the complainant.

The Chancellor decreed, that the bill should be dismissed considering that the complainant had an adequate remedy at law; and also, because the demand was stale, and if within the jurisdiction of Chancery, ought to be governed by the same rules of limitations as would govern a Court of law, if the case had there been presented.

The complainant now prosecutes this writ of error; and assigns that the Chancellor erred in dismissing his bill.

JAMES B. CLARK, with whom was Mr. PECK, for the plaintiff in error, insisted—

1. That the complainant had no remedy at law by reason of the tender. This did not revest the title, which had become absolute in the mortgagee on the default of payment at the day appointed, and by the subsequently acquired possession. (*Thompson v. Patton*, 5 Littel 74; *Demarest v. Wyerkoop*, 3 John. Ch. 129; *Brown v. Lipscomb*, 9 Porter 475.)

2. The statute of limitations is neither pleaded nor insisted on by the answer; if it had been, the evidence might have been such as to have destroyed the bar.

But the statute can have no effect; because the death of the mortgagee prevented any suit from being instituted, either at law or equity, for more than six months; and as no time is disclosed when the letters testamentary were granted, the plaintiff is entitled to consider the longest period which could occur. (*Haupt v. Adm'rs. of Shields*, 3 Porter 247; *Hutcheson v. Tolls*, 2 Porter 44.)

JONES, for the defendant in error, insisted that the evidence in such a case as this, should leave no doubt as to the parol condition by which this bill of sale was sought to be turned into a mortgage.

The evidence is contradictory on this point, as one witness states conversations between the parties, from which a conditional sale may be inferred; and the great lapse of time is persuasive to show that this was probably the true contract.

If, however, it was a mortgage, the title was re-vested in the complainant by the tender, and he could then have maintained detinue or trover for the slave. [Deshazo v. Lewis, 5 S. & P. 91; Harrison v. Hicks, 1 Porter 423.] And, consequently chancery has no jurisdiction.

The defence arising from lapse of time, is sufficiently raised and insisted on by the answer; but if it was otherwise, this is a matter which must be noticed as evidence of title in the defendant at the time when the bill was filed.

If the statute operates until the commencement of the suit, and this is to be determined by the issuing of the subpœna, more than six years and nine months had elapsed. *A lis pendens* is only notice from the time of service of the subpœna.

GOLDTHWAITE, J.—1. There is no difficulty in arriving at a satisfactory conclusion on the first point presented by the argument in this case, either upon the facts, or the law which should govern them.

The testimony of the subscribing witness to the bill of sale, is clear and distinct that it was intended and represented as a mortgage, though absolute in its terms. The mortgagor, doubtless, was ignorant of the rules by which Courts of equity control contracts of this description; and considered himself entitled to hold the slave as his own after the default. The fact that it was a mortgage, is also shown from the declaration made by the defendant's testator when the money was tendered. For it was then refused solely on the ground that it had not been paid at the day appointed; and, therefore, it was not accepted and the slave delivered. The testimony of the sole witness examined on the part of the defendant, does not outweigh, or indeed weaken, that given by the other witnesses;

because it is evident that the first conversation to which he speaks, must have been held before the bill of sale was executed; and that the last one place took after the default of payment, but before the slave was taken from the complainant's possession. It is highly probably that both parties considered the property in the slave as absolutely vested in the mortgagee by the default, and that neither of them was aware of the continuance of the right to redeem. This erroneous impression most probably caused, not only the declarations of the complainant, but also the subsequent action of the defendant's testator in taking forcible possession of the slave.

The distinction between a mere pledge and a mortgage of personal chattels, is one frequently stated in the books, and seems to be perfectly well settled. A pledge is, when a thing is deposited as a security to be returned to the pledgor when he has redeemed it. In this the title is retained, although the possession is parted with. In a mortgage, the title is conveyed, subject to be divested if the condition of the mortgage is performed. (*Cortilyou v. Lansing*, 2 *Caine's Cases in Error* 200; *Jones v. Smith*, 2 *Vesey*.)

2. It is very possible, as the law of mortgages is understood at this day, that a tender of the money due, if made before the mortgagor acquires the possession, after a default in the condition, may destroy the title of the mortgagee. However this may be, we find no adjudicated case which determines that a title once vested by possession and default, can be divested by a mere tender. The case of *Deshazo v. Lewis*, 5 S. & P. 91, does not present the question; for there the time of payment was extended by a parol agreement, and the tender was made before the expiration of the extended period. The only point decided was, that the parol agreement was admissible in evidence to qualify the written instrument. But in the case of *Brown v. Bement*, 8 *Johnson* 96, the precise question came before the Supreme Court of New York, which decided that a tender made to the mortgagee in possession, and after a default, did not revest the title in the mortgagor so as to enable him to maintain trover against the mortgagee.

3. But if it was admitted, that the mortgagor may, under such circumstances, have his action of trover or detinue against

the mortgagee, it will not follow that chancery is ousted of the jurisdiction of a bill to redeem the mortgaged chattel. Even a pledgor may go into equity, whenever it becomes necessary to have an account. [2 Story's Eq. 298, and cases there cited.] Whenever slaves are the subject of a mortgage, it most frequently happens, that it is necessary to take an account, as the mortgagee is in possession, and consequently in receipt of their profits. This is here shown to be the case by the allegations of the bill; and, therefore, we consider that in this case the Court of chancery had jurisdiction.

4. It is argued, that the defence of the statute of limitations is not set up by the answer; and, therefore, is not entitled to be considered. It is probable that the pleader intended to present this point distinctly; but in this, we think he has failed, as the statute is neither pleaded nor insisted on in definite terms. It is only by coupling the two possessions together, that we are enabled to ascertain the length of time that the defendant and his testator have had the possession. It is equally clear, however, that the lapse of time is stated and relied on as a bar. But we are by no means satisfied that it is incumbent on the defendant to set out his title in such a case as this, when he claims the property in controversy. The complainant, in our opinion, must show such a title as will enable him to maintain the suit; and if he has no title, it is unnecessary to examine what defence is made by the defendant. [2 Story's Eq. Pl. 378-390, and cases there cited; Cholmondely v. Clinton, 1 T. & R. 107-109; Hardy v. Reeves, 4 Vesey 479; House v. Peck, 6 Sim. 51.]

5. It has been decided with relation to slaves, that their possession for a period analogous to that fixed by the statute of limitations, under a claim of title, not only operates to bar an action, but also, to invest the possessor with the absolute property. [Shelby v. Guy, 11 Wheat. 361; Brent v. Chapman, 5 Cranch. 358; Newby v. Blakely, 3 H. & M. 57; Story Con. L. 488.]

The same rule applies to the possession of real estate; and it has been repeatedly held, that the holder of a mere equitable title cannot sustain a bill when his right of entry would

have been barred at law, if his title had been legal instead of equitable only. [2 Story's Eq. 736, and cases there cited.]

6. The action of detinue is the only one at law which is at all analogous to a bill to redeem a specific chattel. In that, the chattel is recovered with damages for its detention. When the bill is to redeem, the decree is for the delivery; and if necessary, an account will be taken to ascertain the reasonable profits if any have accrued. In either case, it is conceived, the plaintiff must fail, if he has no subsisting title in himself at the time when the suit is commenced.

The action of trover has no analogy to such a suit in equity; because the recovery is in damages merely, and interest on the value of the chattel when converted, is given from the time of the conversion in lieu of profits. So, also, the recovery in trover is nothing more than a debt against the personal assets of a deceased convertor; but in a bill in equity, the specific chattel may be pursued and recovered from the estate, whether insolvent or otherwise; and the account only would be a general charge on the estate.

So far as the analogy of the statute of limitations can have any bearing on this case, it may be considered precisely as if the action was detinue in a Court of law. Such an action certainly could not be sustained against an executor or administrator as such, although the possession might be cast on him in his representative capacity. It is unnecessary to consider whether such an action is abated by the death of the defendant, or whether it would in such a case survive against the present representative. The action of trover is one which survives by statute. (Aikin's Digest 259 s. 2.)

7. There can be no pretence but this complainant, if his remedy at law was open in consequence of the tender, could have commenced his action of detinue against the defendant at any time after his testator's death when he was possessed of the slave; and such suit would not be within the influence of the act of 1806, [Aikin's Digest 152 s. 2,] which prohibits the institution of any suit against an executor or administrator, *in such capacity*, till after the expiration of six months from the time of proving the will, &c., or the grant of administration. This statute, not applying to such a case, the decision of the

Court in *Tolls v. Hutchinson*, 1 Porter 44, and *Houpt v. Shields*, 2 Porter 247, that the time during which suit could not be brought should not be added to the statute, can have no application.

8. It may be questionable whether this statute was ever intended to control the action of the Courts of equity, for many of its provisions are utterly incompatible with any such an idea; thus, for instance, by the statute, no suit can proceed when the estate of a deceased person is represented insolvent. Again: it may frequently be necessary to commence a suit against an administrator, &c., in his representative capacity, to enjoin a sale, or stay some other action by him in his representative capacity, before the expiration of the six months. This statute is, however, binding on Courts of equity by its analogies, in the same manner as the statutes of limitations are.

9. Having shown that this bill in equity is to be governed by its analogy to the action of detinue, it is sufficient to observe, that the case of *Shelby v. Guy*, and the other cases before cited, are conclusive that an adverse possession of six years under claim of title, gives such a right of property as would enable the defendant to recover the slave from the complainant, if, after the expiration of that period, he had come to its possession; and, consequently, there is no doubt of the efficiency of the same facts when used as a bar to his action.

The question then arises, does the complainant shew on the face of his bill, that he had no subsisting title when he commenced this suit?

The bill is deficient in setting out the dates of many important facts; and only shews when the mortgage was executed. This was the 29th June, 1829; but neither the period fixed by the contract for the repayment of the money loaned, nor the time when the actual possession of the slave was acquired by the defendant's testator, is stated. According to the rules of strict pleading, it was incumbent on the complainant to have been precise in his allegations with respect to each of these particulars. The first was necessary to enable the Court to determine when the mortgage became absolute in consequence of the non-payment; and the last, in order to properly state the account, as the defendant would be liable for the services of

the slave only from the time of actual possession. It is true, that if precise dates had been inserted, the complainant might not have been held to strict proof of the time as stated; and for this reason, the bill may be assumed as sufficiently precise to escape a demurrer. But when the proof establishes the dates, the complainant must make out a case, or his bill must be dismissed. The evidence of the subscribing witness shows that the money was to be repaid in two months; consequently, the mortgage was forfeited on the 29th August, 1829. The same witness proves that the defendant's testator was in possession of the slave about the 1st of October of the same year, at which time the money was tendered and refused. Since that period, no recognition of the complainant's right of redemption is averred by the bill, or shewn by the evidence.

10. In the case of *Humphries v. Terrell*, 1 Ala. Rep. 650, we held that, where the period of redemption was indefinite, the statute began to run from the execution of the mortgage; and if fixed, then from the day of the default. Then, however, the mortgagee was in possession from the time of the mortgage.

In the present case, so long as the mortgagor continued in possession of the slave, the statute did not begin to run, but must have effect only from the time when possession was acquired by the mortgagee; for, until this period, the existence of the mortgage, as such, must be considered as admitted by the mortgagee. The bill was filed in the office of the Clerk on the 3rd March, 1836; but if this is admitted to be the period when the suit must be considered as having a legal inception, a point not now necessary to be determined, then more than six years have elapsed during which the defendant and his testator have had the adverse possession of the slave, claiming to hold it free from any condition.

Under these circumstances, if the title of the complainant to the slave had been legal, instead of equitable only, it would have been extinguished by lapse of time, and that of the defendant become complete by mere force of the adverse possession.

In the case of *Humphries v. Terrell*, before cited, we decided that Courts of equity govern their decisions by by analogies

drawn from the statutes of limitations; and never permit equitable claims to be enforced when legal claims of the same kind would be barred.

Our conclusion is, that the Chancellor's decree is free from error, and must be affirmed.

FOARD v. JOHNSON.

1. Where a bill is dated at a particular place, the drawer cannot be charged by a notice of non-payment deposited in a Post Office and addressed to him at that place, unless that was the Post Office nearest his residence, or unless, upon diligent inquiry, his residence could not be ascertained.

THIS was an action of assumpsit brought by the defendant in error, in the County Court of Sumter, upon a bill of exchange, for two thousand two hundred and nineteen and forty-one hundredths dollars, drawn by the plaintiff in error, at Mobile, on the 28th of January, 1837, in favor of Jas. Bates, Jr., on Jas. F. Roberts. The plaintiff below claims title to the bill as an indorsee.

The cause was tried on the general issue. At the trial, the presiding Judge sealed a bill of exceptions, at the instance of the defendant below. The only evidence offered on the part of the plaintiff below, was the bill of exchange declared on, and a protest thereof for non-payment, together with notice of the non-payment and protest, which it was shown, was deposited in the Post Office at Mobile, addressed to the defendant at that city. It was then proved on the part of the defendant, that he resided in the County of Sumter when the bill was drawn, and had ever since continued to reside there. No other evidence was offered on either side. The defendant by his counsel, then moved the Court to charge the jury, that the notice of non-payment deposited in the Post Office at Mobile, was insufficient, and that no notice of protest to the defendant had

been proved ; which charge the Court refused to give ; and thereupon the defendant excepted.

The jury found a verdict for the plaintiff, and judgment being thereon rendered, the defendant has prosecuted a writ of error to this Court.

Boyd, for the plaintiff in error.

J. B. Clark, for the defendant.

COLLIER, C. J.—The only question raised at the argument was this : where a bill is dated at a particular place, can the drawer be charged by a notice of non-payment, deposited in the Post Office, addressed to him at that place, although it appear, that he did, at the time the bill was made, and has ever since resided elsewhere, much nearer other Post Offices, than that in which the notice was deposited ?

In the case of McGrew v. Toulmin, 2 Stewt. & Por. Rep. 436, Judge Taylor held, that it was not sufficient to look for the drawer at the place the bill was dated, if his residence be elsewhere. Drafts are often in the course of trade, drawn in one place, by persons who are known by all the parties to them, to live in another. To sustain his conclusion, the learned Judge cites Fisher v. Evans, 5 Binney's Rep. 541, which is a case directly in point.

But it has been insisted in argument, that upon this point, McGrew v. Toulmin is overruled by Robinson & Davenport v. Hamilton, 4 Stewt. & Por. Rep. 91. In that case the bill was drawn at "Wigginsville." It was proved, that at maturity it had been regularly protesteted for non-payment, and a notice thereof directed to the drawer at "Wigginsville," deposited in the Post Office at Mobile. There was no evidence that the plaintiff knew of the drawer's residence, or whether there was a Post Office at Wigginsville. The Circuit Court charged the jury, that the plaintiff had not used due diligence ; unless they believed that there existed a Post Office at Wigginsville ; or that the defendant had, in fact, received notice. Judgment being rendered for the defendant, the plaintiffs brought their case into this Court. Lipscomb, C. J., in delivering the opinion of the Court, said, "The drawer of the bill had designated his

place of residence as Wigginsville. It was in his power to have given it a more particular description; his failing to do so in all probability, misled the plaintiff. They may well have inferred from the description given, that the place was of sufficient notoriety to dispense with any other.

"If the maker's place of residence was not known to the holder, and he could not ascertain it, by using reasonable diligence, it would relieve him from the necessity of giving notice. We are therefore of opinion, that the notice was sufficient, unless the knowledge had been brought home to the holder of the bill, that there was no Post Office at "Wigginsville," or that the maker resided at, or near a Post Office."

The Court supposed, 1st. That the place where a bill was dated, was to be regarded as the drawer's residence. That a notice addressed to him at that place, by mail was sufficient; unless the holder knew, that there was no Post Office there, or that the maker resided at, or near a Post Office.

True, it has been held, that where the drawer dates his bill, generally as "Manchester," that a notice directed to him equally general sufficed. [Mann v. Ross, Ryl & Mood, Rep. 249.] But the question in that case, was not whether the place where the bill was dated, indicated the drawer's residence so conclusively, as to make a notice sent there sufficient; but it was, as to the generality of the direction of the notice, or whether the street and number of the drawer's residence, in a city as large as "Manchester," should not have constituted a part of the drawer's address.

In Chapman v. Lipscomb, 1 Johns. Rep. 294, the bill was drawn and dated at *New York*, but the drawers resided at *Petersburg*, and the question was, whether notice should not have been sent to the latter place. There was no evidence, that the holder knew that the defendants resided there; he made inquiry at the Banks and elsewhere, and being informed that the drawers resided at *Norfolk*, he sent a notice, by mail, to them at that place, and another addressed to them at *N. York*. This was held sufficient. The Court cited this case, to sustain their opinion in Robinson & Davenport v. Hamilton; but it will be seen that it is very dissimilar, both in its facts, and the principles on

which it rests. If the place where the bill was dated, was to be regarded as the drawer's residence, a notice, sent to *New York* would have been considered sufficient, without proof, that the holder had made inquiry upon that subject; but the holder was only excused from giving due notice, upon the ground that, after employing reasonable diligence, he could not ascertain where the drawers resided. Such an excuse is always available. [Chitty on bills, 486, et post, and cases cited, 9, Am, ed.; Williams v. The Bank of the United States, 2 Peters' Rep. 96; Galphin v. Hard, 3 McCord's. Rep. 394; Preston v. Dayson, et al., 7 Lou. Rep. 7.]

The most thorough examination has not furnished us any other case, than that cited from 4 Stewt. & Por. Rep., in which the place where a bill is dated, is regarded such evidence of the drawer's residence, as to relieve the holder of the bill from the necessity of inquiry on the subject; and upon principle, it cannot be so considered. By giving locality to the act of drawing a bill, the drawer admits that he is at that place, at that time; but certainly not, that he will be there at the maturity of the bill. The right of locomotion is accorded to all, and none exercise it more frequently than those engaged in commerce.

It was then incumbent upon the holder of the bill in question, if ignorant of the drawer's place of residence, to have made diligent inquiry to ascertain it, and when ascertained there to have sent the notice. As this course was not pursued, the County Court erred in its refusal to instruct the jury as prayed; its judgment is consequently reversed, and the cause remanded.

HUDNALL, USE OF REDUS v. SCOTT.

1. The plaintiff cannot reduce the amount of a set-off by showing an error in the settlement, which led to the execution of the note sued on.
2. The plaintiff cannot make a set-off, to a set-off pleaded or given in evidence by the defendant.

THE action was brought by the plaintiff in error on four promissory notes, amounting to the sum of four thousand four hundred and twenty-eight dollars. Pleas non-assumpsit, payment, and set-off. During the trial, the defendant introduced evidence against the nominal plaintiff, of demands existing previous and subsequent to the date of the notes sued on, and previous to notice of the transfer to Redus, for whose use the suit was brought. To reduce the amount of the off-sets claimed by the defendants against Hudnall, Redus offered evidence to shew that there was an error in the transaction between Hudnall and Scott, out of which the notes sued on grew, of about nine hundred dollars, which remained uncorrected and unadjusted between all the parties. To the introduction of this testimony, the defendant objected, and the objection was sustained by the Court. The error assigned is the rejection of this testimony.

REAVIS, for plaintiff in error, cited 12 Wendell, 356.

HAIR, contra. 1 Ala. Rep. 629.

ORMOND, J.—In the case of Hall v. Cook, 1 Ala. Rep. 629, we held that the plaintiff could not avail himself of a set-off against a set-off pleaded, or given in evidence, by the defendant; but was restricted to showing that the set-off was not admissible, or was a debt which he was not bound to pay. Tried by the rule laid down in that case, the defence offered by the plaintiff to the set-off given in evidence by the defendant, was clearly inadmissible.

The attempt here was, to reduce the amount of the set-off by showing an error in the original transaction, which led to

the execution of the notes sued on. And without stopping now to inquire whether the plaintiff could, in a Court of law, occupy such an inconsistent attitude as to affirm the correctness of the contract, by suing on it, and at the same time to insist that it was erroneous, we consider the answer given by the counsel for the defendant conclusive. That if there was an error in the original settlement which resulted in the execution of the notes, that error could not be transferred with the note. This is so perfectly clear, that argument cannot illustrate it.

Let the judgment be affirmed.

PUCKETT v. KING, UPSON & CO.

1. A note which, on its face is made negotiable and payable at the Branch of the Bank of the State of Alabama, at Mobile, cannot be given in evidence, under a declaration describing a note as payable generally.

Writ of Error to the County Court of Sumter County.

ACTION of assumpsit by the endorsees of a promissory note against the maker. The note is described in the declaration, as payable six months after its date to Lea & Langdon. At the trial, on the general issue, a note purporting to be negotiable and payable at the Branch of the Bank of the State of Alabama, was offered in evidence under this declaration. The defendant objected to its admission as variant from that described, and when the objection was overruled, excepted to the decision.

Verdict and judgment for the plaintiffs.

The defendant prosecutes the writ of error, and assigns that the County Court erred in admitting the note in evidence.

GREEN, for the plaintiff in error.

REAVIS, for the defendants in error, insisted, that the variance was immaterial, the note having been described according to its legal effect.

GOLDTHWAITE, J.—The note should have been excluded from the jury, as the contract offered in evidence is different in its legal effect, from that described in the declaration.

It is true, that in either case the maker of such notes is bound generally, and he is not discharged in the case of the one payable in Bank, by the omission to present it at the place where the payment is to be made; but the distinction between the contracts evidenced by the notes, is, in the case of the note payable in Bank; if the maker had funds at the particular place, at the day, he is authorized to show this fact in his defence, in a plea of tender; his contract, therefore, is not the same, as when he contracts to pay absolutely, and wherever the note may be presented to them.

Let the judgment be reversed and the case remanded.

KENNEDY'S HEIRS AND EXECUTORS v. KENNEDY'S HEIRS.

1. It is not permissible to add to, or vary a contract in writing, by parol evidence; unless the party offering such evidence will lay a ground for its introduction, by the proof of fraud.
2. Neither the common law, nor the statute of frauds and perjuries, inhibit the admission of parol evidence to vary, or totally defeat a written contract tainted with fraud.
3. *Semble*. The statute of frauds was intended to prevent fraud, and not as a cover under which it may be consummated; and where such a result would follow the non-execution of a contract, equity will enforce, or set it aside, though its terms are not attested by writing.
4. At common law, fraud does not constitute a bar to an action upon a specialty. The fraud that avoids a specialty at law, must relate to the *execution of the instrument*. But the jurisdiction of Chancery is much more extensive.

Kennedy's heirs and executors v. Kennedy's heirs.

5. Courts of equity administer remedies for rights in cases in which Courts of law recognize no rights at all, or if recognized, they are left to the conscience of the parties. Trusts are without any cognizance at common law; but they are cognizable in Courts of equity, and a remedy is there given to the parties, beneficially interested, for all injuries arising, either from negligence, or positive misconduct.
6. So Courts of equity will grant relief, in cases of losses and injuries, by mistake, accident and fraud, as well as undue advantage and imposition, betrayal of confidence, and unconscionable bargains.
7. Fraud as denounced in equity, includes all acts, omissions, or concealments, which involve a breach of a legal or equitable duty, trust or confidence, justly reposed, which are injurious to another, or by which an undue and unconscientious advantage is taken of another.
8. If a deed is fraudulently obtained without consideration; or for a consideration so inadequate, as to shock the conscience, or if by fraud, accident, or mistake, a deed is framed contrary to the intention of the parties, the forms of proceeding in Courts of law, will not allow them to administer justice; but equity can give the appropriate remedy.
9. It has been repeatedly declared, that such is the solicitude of Courts of equity to suppress fraud, that they will not undertake to enumerate the cases, of which, upon a suggestion of fraud, they will take jurisdiction.
10. A Court of equity will take from a party, the benefit which he may have derived from his own fraud, imposition, or undue influence, in procuring the suppression of an act, intended to be done for the benefit of a third person.
11. Parol evidence is admissible to show the fraudulent use of a deed; or that a party receiving an absolute deed upon a promise, that he would dispose of the property conveyed by it in a particular manner, refused to perform his promise.
12. Notwithstanding, it may not be allowable at law, to show a consideration other and *different* from that expressed in the deed; yet, the statement of a specific consideration is inconclusive in equity, and will not prevent that Court, where fraud is proved, from setting aside the deed, or in the case of an absolute deed from administering equitable relief.
13. Where an absolute deed, expressing upon its face, a monied consideration, was shown by extrinsic proof, to have been made upon a promise, by the grantee to the grantor, that he would hold, or dispose of the property conveyed for the use of the heirs of the grantor; which promise he refused to perform. Held that the measure of the relief to which the heirs were entitled in equity, was the cancellation of the deed, and this result could not be avoided by the grantee's offering to pay the consideration expressed in it.
14. In a bill seeking to set aside a deed for fraud, it is not necessary to charge the fraud *in totidem verbis*. If the bill states with directness and precision, fact and circumstances, which amount to a fraud, it is sufficient.
15. So, while it is proper, that every material fact, to which the plaintiff intends to offer proof, should be distinctly stated in the bill; yet, a general charge, or statement is sufficient, leaving the circumstances to be made out by proof.
16. Although Courts of equity look with jealousy and suspicion upon a purchase made by a trustee of his *cestui que trust*, or by an agent of his principal; yet such purchases are allowable, if the purchaser made a full and fair disclosure, and took no improper advantage.

17. Where an application is made to equity, to rescind a contract, the undue exercise of an influence, by the defendant over the complainant, resulting from confidence and friendship, exerts great potency in inducing relief.
18. In a litigation respecting the real estate of a deceased person, his heirs who are interested in the estate, should be parties; and the powers conferred upon executors by will, may, in some cases, be so extensive as to make them necessary parties in equity.
19. To coerce a settlement of the accounts of an executor, his executor is the only necessary party, inasmuch as the personal estate is primarily liable to the payment of what may be found due.
20. In order to prevent multiplicity of suits, Courts of equity sometimes entertain bills by complainants between whom there exists no privity of contract, and against defendants between whom there exists no connection whatever, except a community of interest. Thus it is, in a bill by creditors, to subject a fund to the payment of debts, and of "bills of peace" generally.
21. *Semble*. The objection of multifariousness is confined to cases, where the case of each defendant is entirely distinct and separate in its subject matter from that of his co-defendants; for the case against one defendant may be so entire as to be incapable of prosecution in several suits; and some other defendant may be a necessary party to only a portion of the case. In the latter, multifariousness is not an available objection.
22. The decisions as to what constitutes multifariousness, are so exceedingly various as to make it difficult, if not impracticable to educe any general rules, by which to test the objection—the Court seeming to regard what was convenient and just in the particular case,—always discouraging the objection where in stead of advancing, it would defeat the ends of justice.
23. The rule against multifariousness it seems is intended to prevent unnecessary litigation, and needless and oppressive expenses.
24. The testimony of a witness who speaks positively to a fact, is entitled to more consideration than several witnesses whose statements are merely negative.
25. Where an absolute deed is made upon a promise, that the grantee will dispose of the property conveyed in a particular manner, the inability to show the terms of the grantee's undertaking, may defeat the intentions of the grantor, but cannot prevent the deed from being set aside.
26. Upon setting aside a deed, on a suggestion of fraud, the rights of both parties must be protected. If the grantee has in good faith made expenditures of money upon the property embraced by it, he is entitled to its reimbursement with interest &c.
27. In the construction of statutes, they should be so interpreted, if practicable, that the intention of the Legislature may be carried into effect, and the spirit of the enactment preserved. Under the influence of this rule, the letter is frequently sacrificed to the general purposes and intention of the act.
28. The Legislature which enacted our statute of frauds, must be presumed to have been cognizant of the construction placed upon the English statute; and in adopting substantially the terms of that enactment, impliedly approved the judicial interpretation, which it and similar acts had received in England and the United States.
29. It is the settled practice of equity, to direct *an issue at law* where a question

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arises upon the validity of a will; and it seems, that it would be irregular to render a decree against the heir, until the invalidity of the devise had been found by a jury. According to the practice of the English Chancery, it is usual to direct an issue to try whether A. is heir &c., or the existence of a *modus decimandi*, or a real and immemorial composition for tithes.

30. Although a Court of equity, except in the excepted cases, is not bound to direct an issue, merely because the evidence is contradictory; yet where the proof is so conflicting as to make it difficult to attain a satisfactory conclusion, it is a prudent, if not an indispensable course, to refer the facts to a jury.
31. The object of an issue is to satisfy the mind of the Chancellor upon matters of fact, but if his conscience is satisfied, without the aid of a verdict, it is competent for him to render a decree, unless it be in the excepted cases.
32. A decree against infants need not prescribe a time within which they may impeach it after attaining their majority—the statute ascertains the time, and it need not be repeated in the decree.

Joseph S. Kennedy, Jesse Carter and Mary L. (late Mary L. Kennedy) his wife, and Martha Kennedy and Delphine Kennedy, infants under the age of twenty-one years, by Joseph S. Kennedy, their brother and next friend, children and sole heirs of Wm. E. Kennedy, deceased, filed their bill in the Chancery Court, holden at Mobile, on the 22nd April, 1839.

The complainants state that Wm. E. Kennedy for many years previous to his death, was a free drinker, gradually becoming more intemperate and subject to intoxication; and when intoxicated, or partially so, and particularly towards the close of his life, would make conveyances of his real estate to any one who would ask him, for a very inadequate, or no consideration at all.

After the death of Wm. E. Kennedy's wife, (which it seems occurred about 1821,) Wm. E. with all his children, except Delphine, went to the house of Joshua Kennedy, and there resided with Joshua and his family. At that time Wm. E. reposed great confidence "in the honesty, integrity and faithfulness" of Joshua "in the transaction of business." Joshua acted as Wm. E.'s agent, consulted and advised him as to the management and disposition of his property.

Joshua, Joseph a younger brother, and others the relations and friends of Wm. E. in consequence of his intemperate habits, and the reckless dissipation of his property, consulted together as to what they should do, to prevent it; whereupon, they concluded it was best to urge and advise Wm. E. to con-

vey his property, or the greater part of it to Joshua, for the benefit of the female complainants and Joseph S. his son.

At different times, Joshua, Joseph, and others, the relations and friends of Wm. E. did urge and advise him to convey his property to Joshua, for the purpose of securing the same for his children. After repeated and urgent solicitations, Wm. E. did on the 13th December, 1824, execute an absolute deed of conveyance to Joshua of extensive and valuable real property, in, and contiguous to the city of Mobile.

And the complainants alledge, that the deed so executed "was intended and meant by the said Wm. E., and so understood and received by the said Joshua at the time it was made, as a conveyance from the said Wm. E. to the said Joshua, *in trust*, for the benefit of your orator, Joseph S. and oratrix, pursuant to the advice and entreaties of the said Joshua and others." "That no part of the consideration in the said instrument mentioned, was ever paid, or intended to be paid by the said Joshua to the said Wm. E.; and that the said instrument was made as it was, upon the advice and opinion of the said Joshua, given to the said Wm. E. that it would make, the said Joshua, a trustee of the estate to be conveyed by it for your orator and oratrix; and upon his promise to the said Wm. E. that he would hold the estate to be conveyed," &c. "in trust for them." "That the said Joshua has repeatedly since the making of said instruments, and until recently before his death, admitted and declared the said instrument to be a conveyance in trust for the sole benefit of the heirs of the said William E.

The lands conveyed, are south of latitude 31°, and were acquired by Wm. E. while the country in which they are situate, lying between the Iberville and Perdido, was subject to the dominion of the King of Spain.

It is further alledged, that Wm. E. had frequently from 1806 to 1824, lent Joshua money and made him conveyances of land in Mobile and elsewhere. The bill sets out the business in which Joshua had been engaged—his reverses a short time previous to 1824; and avers that by no "manner of means" could he have paid the sum of ten thousand two hundred dol-

lars, the sole consideration expressed in the deed of December, 1824.

It is also stated, that Wm. E. died on the 9th May, 1825—that on the 18th June thereafter, Joshua applied for, and obtained letters of guardianship of the persons and estates of the female complainants and their brother Joseph S. And on the last mentioned day, Joshua also qualified as the sole executor of the will of Wm. E. under an order of the Orphans' Court of Mobile. In virtue of both these trusts, Joshua took possession of a considerable property belonging to the estate of his testator and his wards.

Complainants alledge, that Wm. E. left at his death but one hundred and one eighteen-one hundredths dollars in cash.—That after the death of Wm. E., Joshua sold and conveyed a considerable portion of the real estate conveyed to him, by the deed of December 1824, and received the purchase money therefor; that he received large sums for rent; that much remains unsold, the rents from which are considerable.

After the death of Wm. E., Joshua became possessed of all his valuable papers, including evidences of title to real estate &c.

The bill then alleges the death of Joshua Kennedy, in December 1838, having first made his last will and testament by which he appointed William R. Hallett and Robert L. Walker his executors; who immediately thereafter proved the will, and were in due form invested with authority to execute the same. Joshua at the time of his death, left as his only heirs, his wife Susan Kennedy, and his infant children Secluda, Mary, Clarissa, Joshua and Augusta. That the executors have possessed themselves of the rights and credits, &c. of their testator, as well as all property and papers which were in his hands as the executor of Wm. E. Kennedy or the guardian of the complainants.

It is charged that Joshua refused to execute a writing declaring the terms on which he received the deed of December, 1824, from Wm. E; and that his executors have refused to execute such a writing since his death.

The executors, widow and children, are all made parties, and a guardian *ad litem* is appointed for the infant defendants.

The bill prays that the deed from William E. to Joshua

Kennedy, may be set aside, and that the executors of the latter may be restrained from selling any part of the land embraced by the same, until the cause is finally heard; and that an account may be had, &c.; and such sums as are found due to the complainants or their guardians may be paid—That the executors, the widow and heirs of the testator, and all others claiming title to the lands in question, may be decreed to convey to the complainants so much thereof as was undisposed of by the testator in his lifetime, or his executors since his decease. The bill contains a prayer for general relief, and that *subpœna* may issue in usual form.

The defendants answered jointly and severally, admitting that the complainants are the sole heirs of William E. Kennedy; that William and Joshua were related as stated in the bill; and that William died at the time alledged at the house of Joshua, where he had resided for two or three years previously.

It is also admitted, that Joshua became the guardian of William's children; and that William left a will, and Joshua qualified as his administrator with the will annexed—That the names of the widow and children of Joshua are correctly stated; and that the children are under twenty-one years of age—That Joshua made a will, appointing William R. Hallett and Robert L. Walker, his executors, both of whom have qualified as such.

The defendants deny that Joshua possessed himself of a very considerable estate belonging to the complainants—That if an account had been kept by Joshua of monies expended for his wards, they would be largely indebted to his estate—That Joshua provided many things for the family of William, and paid debts for him before he removed with his children to Joshua's house.

It is alledged, that William was not of a speculative turn of mind, which would have induced him to seek the accumulation of property; that he died comparatively poor; and that the personal estate left by him would not have defrayed the expense of educating his children.

It is further stated that Joshua took the same care of Wil-

liam's children and property as he did of his own—that he expended large sums of money in preserving their property and securing titles to their lands.

The defendants deny that the deed of December, 1824, was subject to any trust whatever; but they alledge that the Price grant was obtained by Joshua for Price, and purchased from him, and that Joshua paid the entire consideration of the purchase—That the conveyance from Price was made to William because he had married a Spanish subject, and could hold lands within the territory of Spain, while Joshua could not; and that William retained the title sometime after 1813, that a confirmation of the Spanish grant might be obtained from the United States.

The defendants think that William had some interest in the Price grant, for the use of his name, or some other cause—What that interest was they cannot undertake to say; but insist that the deed of 1824 was intended as a full and fair settlement of all previous transactions, and a relinquishment of all interest.

It is further stated that, in 1824, Joshua contracted a violent cold, which settled on his lungs, and it was believed by himself and many of his friends, that he would not survive, and was advised to visit Cuba in search of health; previous to his departure he settled with his brothers Joseph and William; and upon a settlement with the latter, the deed of December, 1824, was executed and received without any *trust* on the part of Joshua. The defendants insist that the consideration expressed, viz: ten thousand two hundred dollars, was paid in money, or its equivalent—that, that sum was a full consideration for the land at that day—in 1824 lands in Mobile were of little value, and besides, the title to the property in question was imperfect, and its confirmation was considered as exceedingly uncertain. They affirm that the confirmation of the Price and M'Voy claims, are mainly attributable to the efforts of Joshua, who devoted much time and expended much money to effect that object.

The defendants deny, that William was induced to execute the deed of '24, in consequence of the fraudulent representations of Joshua, and plead the statute of frauds and perjuries

in bar of the admission of parol evidence to contradict the deed. They further deny, that Joshua ever admitted, that that deed was made upon any trust, but affirm, that he always insisted that the Price grant was made to William, because he (Joshua) could not hold lands under the Spanish Government.

The answer states matters in avoidance of the complainant's right to recover, and concludes with a demurrer, assigning several causes; so far as these were insisted on at the argument, they are noticed in the opinion of the Court.

A copy of the will of Joshua Kennedy accompanies the answer, as an exhibit, from which, it is seen, that the executors are invested with very extensive powers over the real and personal estate of their testator. They are permitted to lease, exchange, or sell lands, to arbitrate and compound suits to the same, to do all acts towards perfecting titles and adjusting boundaries, to prosecute, abandon, or defend suits or claims to land, &c,

The record contains some sixty or seventy depositions, some of which are drawn out at great length. In addition to which, it embodies a volume of deeds and other documentary proof, which it is not deemed necessary to notice in detail. The following statement of facts are entirely sufficient to the correct understanding of the opinion of the Court.

The lands comprised in the deed of 13 December, 1824, from William E. to Joshua Kennedy, consist of the McVoy and the Price grants. The former was conveyed to William E. and Joshua jointly by McVoy on the 6th May, 1814. The latter consisted originally of two concessions or grants made by the Spanish government to Thomas Price. The first was a concession by Governor Gayosa to him for six hundred arpents in 1798. On the 1st September, 1806, Price, desiring to obtain an additional grant for five hundred arpents, by Joshua Kennedy as his agent, petitioned the Intendant General at Pensacola, who granted the petition "by way of sale," and directed the survey to be made. On the 20th November, 1806, Price, by a petition, addressed to the commandant at Mobile, set forth that he had created Joshua Kennedy his agent at Pensacola, to obtain for him a further grant of five

hundred arpents of land, in consideration of the arrears of his salary for three years as Interpreter, and other claims which he had on the government, and denying his authority to purchase land for him ; and also setting forth, that the boundaries of the land granted on the petition of Kennedy, were included in the grant already made by Gayosa—and prays, in consideration of the premises, a grant of five hundred arpents, the intended boundaries of which are given. This petition was granted by the Commandant at Mobile, and confirmed by the Intendant General at Pensacola, and an order issued to the proper officer at Mobile to make the necessary survey.

This last mentioned tract was, on the 22d November, 1806, conveyed by Price to William E. Kennedy for the consideration, as expressed in the deed, of two hundred dollars ; and on the 24th of the same month, he executed to him an irrevocable power of attorney to cause the necessary survey to be made.

On the 25th August, 1813, for the consideration of five hundred dollars, Price conveyed to William E. Kennedy the tract of land granted to him by Gayoso in 1798. These grants were subsequently confirmed by Congress.

Portions of these lands were at different times conveyed by William to Joshua Kennedy, from 1815 to 1820, the consideration expressed in some of the deeds being money paid, and in others a valuable consideration. One of these deeds, dated the 20th of November, 1818, conveys to Joshua Kennedy eighty arpents, part of the Price tract, the consideration being expressed to be the “sum of five hundred dollars to me formerly paid at the time of purchasing a tract of land from Thomas Price by Joshua Kennedy.” William also made nearly one hundred deeds to other persons, for portions of the land between the years 1817, and the execution of the deed from him to Joshua of December, 1824. During the same interval, some conveyances for portions of the land were made by the brothers jointly, and a few by Joshua individually.

In 1818 or 1819, a deed of partition appears to have been made between the two brothers, accompanied by a map executed by one Matthews, on which the lots allotted to each were marked with the initials of their names. This deed has

not been produced, and is probably destroyed; but a copy of the map, supposed to have been made by Matthews, is preserved, and is among the papers of the cause.

A very brief abstract of such portions of the testimony as are deemed at all material, is as follows :

Seafroy Dolive was the brother-in-law of William E. Kennedy, and knew that he purchased the Price and McVoy claims. William resided with Joshua after the death of his wife, and was intemperate. Joshua told witness and his brother Louis, that William was fooling away his property; and the only way to save it for his children, if they were willing, was to induce William to convey his property to him. Witness afterwards advised William to convey his property to Joshua for the benefit of his children; and a few months before his death, he told witness he had done so. Joshua also told witness before the death of his brother, he had made over his property to him for the benefit of his children; and frequently after his death, told witness he had saved his brother's property for his children, and that they would be rich.

Samuel H. Garrow knew both the Kennedys'. William, for several years before his death, resided with Joshua. He was intemperate, and, in the opinion of witness, when intoxicated would easily part with his property. Has an impression that he was present at a conversation between the two brothers, in which William was advised to make over his property to his brother Joshua to prevent his making away with it. Witness heard from Joshua that a deed had been made by William, by which something would be saved for his children. Joshua, for some time before William's death, transacted all his business. William had great confidence in Joshua, and would let him do any thing he pleased. The Price claim was always reported to be the property of William. Was present at the execution of the deed of partition in 1818 or 1819, and knows of no conditions attached to it.

Daniel Robertson says Joshua stated to witness, that he had got the titles in his own name for the better management of the property; and that it was not thereby intended to take away the right of the children of William to it. Had several conversations, after the death of William, to the same purport.

Louis Dolive was the brother-in law of William E. Kennedy, and says William was occasionally intemperate, and when drunk, very free and generous. Knows that William purchased the Price claim, and understood that William and Joshua purchased the McVoy claim jointly. Says that Joshua came to him and said that William was wasting his property, and that something should be done to save it for his children. Witness replied, that he was the most proper person to do it, as he had influence over him. Some time after, Joshua told him that his brother had passed to him all his property by a deed of trust—that he had the whole management of it, and his children would have plenty of land. Says that Joshua had as much influence over his brother as a father over his child.

Cyrus Sibley states, Joshua told witness it was his intention to divide his Mobile property equally between his children and those of William. In the latter part of his life, William was much debilitated, and seemed to have a dependence on Joshua for advice and counsel.

Chester Root heard Joshua say, that William was giving away lots in the Price claim, and that he had advised William to give him a deed of all the unsold lots in the Price claim, that he might preserve it for his heirs. Believes he heard the late John Elliott, Esq., advise William to put all his property into Joshua's hands. Has heard Joshua say repeatedly, that his great object in taking possession of the property of William, was for the benefit of his heirs; and as late as the year 1828, heard Joshua say he had got his brother's estate so fixed that his heirs would be very wealthy.

Joseph Krebs says, Joshua told witness that William had given him a deed for his lands, because he was fooling them away; but did not state the object of the conveyance.

Patrick Byrne says, the health of William was considerably impaired in the latter part of his life; and thinks that he looked to Joshua for counsel and advice, and gave him the control of his property.

John Shelton wished to purchase of Joshua a lot near the centre of the Price claim, which he declined to sell, saying it belonged to the heirs of William. This was in 1827 or 1828.

Edward Hall thinks that William's habits had been affected by intemperance; and that in the latter part of his life, he had given up the management and control of his property to Joshua, who appeared to have unlimited control of his effects.

B. Smoot says, Joshua had great influence over William; and that he was guided by his opinion and advice in relation to his affairs.

G. Davenport says, Joshua appeared to manage his brother's landed estate, and he appeared to lean on him for counsel and advice. Heard Joshua say, after the death of his brother William, in reference to the sale of some lands, that it was for the benefit of his brother's children; that the property of the heirs of William was large; and that they would be very rich.

Thaddeus Sanford was the editor and proprietor of the Mobile Commercial Register in 1829; in the month of February and March of that year, an advertisement appeared in that paper, advertising a sale of lands in the city of Mobile.

[Signed.]

JOSHUA KENNEDY,
HENRY GARRISON,

Auctioneers.

The witness has not been able to find the manuscript, but the expense of the advertisement was paid by Joshua Kennedy. A portion thereof is to the following effect:

The squares between St. Louis and St. Michael streets, will be leased for ten years, at the expiration of which period, the property shall revert to the legal heirs and representatives of William E. Kennedy, deceased, and the undersigned in equal proportions."

Diego McVoy says, towards the close of the life of William E. Kennedy, he did not consider him capable of managing his own affairs, and that he depended on Joshua to manage his business.

Maxfield Kennedy, the brother of Joshua and William, states, that the latter was indicted and tried in South Carolina, for the murder of Col. Maxwell, in 1797; that the expenses of the trial were near ten thousand dollars, and advanced by him; that he came to Mobile frequently for payment; that in 1820, Joshua assumed the payment, but has never paid him but six-

teen hundred dollars, and that he holds his estate bound for the residue.

Waddy Thompson, Senr., of South Carolina, states, that he was a practising lawyer at the time William Kennedy was tried for the murder of Col. Maxwell, that he was acquitted, and that the expenses of the defence could not have been more than five hundred dollars. That he knew Maxfield Kennedy, and that he could not have paid the one hundredth part of ten thousand dollars, either in money or by his credit.

John G. Aikin knew Maxfield Kennedy in Tuscaloosa county—he was very poor.

Witness had a conversation with Joshua Kennedy in 1835, in which Joshua spoke of his advances to Maxfield, as a gratuity—asked for, and given as such.

Samuel Kitchens states, that Joshua went to Havanna with some lumber to sell, and on account of his health, which was very bad in the winter of 1825; while he was gone, a report prevailed, that he had died on the outward passage.

Witness was in Mobile at the time, and had a conversation with William Kennedy, who told witness that a settlement had been made between him and his brother previous to his departure for Havanna, and expressed his gratification, that it had been done, should the report of Joshua's death be true; as there could now be no difficulty between him and the heirs of Joshua.

Thomas H. Lane says, he saw William in the latter part of the year 1824, who told him he had come across the Bay to have a settlement with his brother, and had succeeded in doing so; and that any lands he might wish to purchase, he could purchase from Joshua, whose title would be good.

George N. Stewart had a conversation with Joshua Kennedy in his last illness, who, speaking of the claim of his brother's heirs, said, that the property was his, and always had been his; that he had got it for Price, and bought it from Price, and that it never belonged to William, and that the title was taken in his name, because he was a Spanish subject and could hold lands, and that he, Joshua could not.

Charles de Laye says, that William told him that he owned the lands, but that Joshua had the control of them, and he never did any thing without his, Joshua's consent. In the latter part of 1824, or commencement of 1825, he applied to William to sell him a piece of land, when William told him he had sold every thing to his brother Joshua, and had nothing to do with any claim he had before. Offered to go to Joshua and ask him to sell the land to witness; they went, but did not find him.

William Kitchens says, that the health of Joshua Kennedy was bad at the time he went to Havanna; that he carried eighty thousand feet of lumber with him; that none of his connections went with him, and he had no clerk, or business agent with him; William Kennedy and his family lived with Joshua after the death of William's wife.

Many witnesses on both sides speak of the health of Joshua at the time he left for Havanna, which was, shortly after, the execution of the deed of 1824.—Some considering his health very bad, others, that he was in usual health, and that the object of his visit was the examination of Spanish records. It was also proved, that before he left, he made a settlement with his brother Joseph.

A great many witnesses were also, examined, who proved that they were intimate with Joshua Kennedy, and never heard that the children of William had any claim or right to the estate, or that Joshua held the property in trust for them.

Joshua supported and educated the children of William, and at his death gave to each of them a square of land in the city of Mobile, on condition they relinquished all further claim on his estate, which condition he exacted, as he stated to Mr. Stewart, because he had heard that some of the children intended to prosecute a claim against his estate, after his death, and he did not wish his children harrassed by law suits.

The cause came on to be heard at a term of the Chancery Court, holden in November, 1840, on the bill, answer, exhibits and proof: whereupon it was adjudged, that the deed of the 13th December, 1824, was not upon any consideration deemed valuable in law; but for the purpose of enabling Joshua Kennedy to secure and provide for the management of the estate,

in which he was interested, and to secure an adequate provision for the children of William E. Kennedy. It was also adjudged that Joshua and William E. Kennedy were jointly interested in the Price and McVoy claims, and that the Baudine claim was covered by the Price claim.

It was further determined, that the complainants, as heirs of William E. Kennedy were entitled to an account of the monies received by Joshua Kennedy in his lifetime, and by his executors since his decease, upon all sales of land embraced, either in the Price, McVoy or Baudine claims; and also, to an account from the executors of the monies received by Joshua Kennedy in his lifetime, as guardian of the complainants, and as administrator of the estate of William E. Kennedy.

It was also ordered and adjudged, that the complainants be admitted into the possession of an undivided half of the Price, McVoy and Baudine claims; save and except such parts thereof, as were sold and conveyed, either by the said William E. or Joshua Kennedy, or the executors of the latter, since his decease; and that it be referred to the Master to prepare a deed conveying to the complainants those lands, with the exception aforesaid, which deed shall be executed by the executors of Joshua Kennedy, under the power contained in the will of their testator, and in obedience to the directions of the decree.

It was also referred to the Master to state the accounts between the complainants, and the defendants, Hallett and Walker executors, &c., as representing Joshua Kennedy in his several capacities of guardian of the children of William E. Kennedy, and executor of his last will and testament, and also trustee, under the deed of the 13th of December, 1824; and also, to state an account between the complainants and defendants, Hallett and Walker, executors, on account of lands sold, or conveyed by them, since the death of their testator. And it was further ordered, that in taking the several accounts required, the executors of Joshua Kennedy be allowed all fair credits, to which, individually, or in their representative capacity, they may show themselves entitled. It was lastly ordered and adjudged, that Hallett and Walker, executors as aforesaid, pay

the costs of this cause from the estate of their testator, in their hands, to be administered.

To revise this decree, the defendants have prosecuted a writ of error to this Court.

This cause was elaborately and ably argued, as well for the plaintiffs in error, as the defendants; the argument occupying the attention of the Court for ten consecutive days. It is impossible to do justice to the learned counsel by any report of their arguments, that can be here made, but the points raised so far as it was thought necessary to consider them, will appear from the opinion of the Court.

J. GAYLE, THORNTON & STEWART, for the plaintiffs, insisted upon the following general proposition, viz:

First. The bill is multifarious, in seeking to set aside the deed of 1824, from William to Joshua Kennedy, and to obtain a settlement of the accounts of the latter, as the executor of the will of William.

Second. The deed from William to Joshua expressing a mortgaged consideration, and being absolute on its face, parol proof, to show that it was made upon a trust, or condition, is inadmissible. [11 Vermont Rep. 138; 6 Johns. Rep. 20, 7; Ibid. 186, 16; Ibid. 302; 6 Wend. Rep. 277; 1 Lom. Dig. 198, 9, 200, 315; 1 Phil. Ev. 265, 548, to 552, 560, 7, 8, 9, 570, 2, 5, 6, 7, 8, 598, 9, 2; Story's Eq. 243, 4, 286, 742, 6; 3 Phil. Ev. H. & C. notes 967, 1432, 4, 1449, 1451; 1 Johns. Ch. Rep. 147; Ibid. 339, 594; 5 Ibid. 1; 6 Ves. Rep. 32; 1 Dess. Rep. 333; 1 Gill. & J. Rep. 80; 10 Ves. Rep. 517, 12; Ibid. 74; Caro. L. Rep. 262; 4 Kents' Com. 142; 1 Bibb's Rep. 610, 203; 2 Bibb's Rep. 311; 4 Ibid. 59, 103, 472, 4; 5 Porter 195, 498; 1 Story's Eq. 158, 165; 3 Litt. Rep. 402; 5 Litt. Rep. 74; Litt. Sel. Ca. 412; 3 Ves. Rep. 706; 1 Bro. Ch. Rep.; 4 Russell's Rep. 738; 21 Wend. Rep.; 6 Wheat. Rep. 418; 1 Peter's Rep. 364; 3 Stewt. & Porter's Rep. 230; Roberts on frauds 80, 7, 102, 3.

Third: Even admitting it was competent to establish a trust or condition by parol, the proof is the record insufficient for that purpose.

HALL, CAMPBELL & HOPKINS, for the defendants, cited, 2 Atk. 150, 254; 1 Por. Rep. 338; 4 Johns. Ch. Rep. 167; 2 Vern. Rep. 307; 2 Munf. Rep. 187; 5 Rand. Rep. 211; 1 Atk. 47; 2 Atk. 98; 16 Mass. Rep. 220; Roberts on Frauds 102; 5 Viner's Ab. 521; 1 Ves. Sen. 123; 1 Vern. Rep. 296; 2 Ibid. 505; 2 Ves. Beames 260; 3 Atk. 539; 10 Cond. Eng. Ch. Rep. 241; 1 M. C. Ch. Rep. 119; Amblers' Rep. 67; 2 Chan. cases 179; 1 Dall. Rep. 424; 1 Paige's Rep. 147, 280; 6 Paige's Rep. 355; 14 Ves. 273; 10 Cond. Eng. Ch. Rep. 188; 2 Ves. Sen. 548, 627; 2 Sch. & Lef. Rep. 500; 10 Peters' Rep. 269; 13 Ves. 136; 9 Ibid. 292; 7 Bro. Par. cases 70; 1 Vern. 205; 3 Cow. Rep. 537; 1 Por. Rep. 338; 1 Johns. Ch. Rep. 582; 1 Dall. Rep. 193; Roberts on wills 59; Story's Eq. Plead. 229; note 1, 230, 2, 408 to 414; 4 Phil. Ev. H. & C. ed. 1489, 1491; Roper on Leg.; 1 Chap.; Roberts on Frauds 333; 1 Wash. C. C. Rep. 397; 2 Sumner's Rep. 613; 3 Mod. Rep. 191; 2 Ves. Rep. 287; 5 Ves. Rep. 644; Roberts on Frauds 92, 3; 3 Peters' Rep. 210; 6 H. & Johns. Rep. 435; 9 Ves. Rep. 515; 6 Ves. Rep. 51; 3 Leigh's Rep. 492; 7 Cond. Eng. Ch. Rep. 509; 3 Wend. Rep. 380; 2 Sumner's Rep. 498; 10 Pet. Rep. 509; 2 Har. & Gill. Rep. 200; 9 Por. Rep. 63; 8 Cow. Rep. 290; 2 Hall. S. C. Rep. 433; 13 Johns. Rep. 400; 2 Johns. Rep. 177; Story's Eq. Pl. 144, 190; 1 Mitf. Pl. 175; 3 Paige's Rep. 379.

COLLIER, C. J.—In the examination of this cause, we are to inquire, *First*: does the law arising upon the bill, answer, and the demurer embraced by the latter, entitle the complainants to the relief they seek. *Second*: has the case of the complainants been made out by proof?

First: Where parties have entered into a contract in writing, in the absence of fraud, the law intends, that the writing contains the entire agreement, and consequently, will exclude all parol evidence tending to show, that there were other terms not embraced. [Paysant v. Ware, Barringer, et al., 1 Ala. Rep. N. S. 160.] If, therefore, a party would show, that the contract contains other terms than the writing indicates, it is incumbent on him to lay a foundation for the introduction of such proof. [Prevost v. Gratz, 6 Wheaton's Rep. 481.] But

neither the common law, which accords to writings a higher dignity in the scale of evidence, than mere oral statements, nor the statute of frauds and perjuries, inhibit the admission of parol evidence to vary, or totally defeat, a written contract tainted with fraud. [2 Story's Eq. 55.]

In *Sweet v. Jacocks*, 6 Paige's Rep. 355, it appears, that Jacocks, acting in behalf of his eight illegitimate children, effected a compromise with their brother and sister of the half blood, by which the latter released to him eight-tenths of certain property, which they inherited through their mother, for the use of the illegitimate children; but the conveyance on its face, was absolute. Both the vice-Chancellor and Chancellor were of opinion, that the beneficial interest in the property released to Jacocks, belonged to the eight children, and that he could not set up their illegitimacy as a defence to their claim. And that, having assumed to act for them, and actually obtained the property under a conveyance, intended for their benefit, he could not be permitted to insist, that they had no interest in that property, and that he held it discharged of the trust. The Chancellor lays it down as "a settled principle, that where a person undertakes to act as agent for another, he cannot be permitted to deal in the matter of that agency upon his own account, and for his own benefit. And, if he takes a conveyance in his own name, of an estate, which he undertakes to obtain for another, he will, in equity, be considered as holding it, in trust for his principal." [Parkist v. Alexander, 1 Johns. Ch. Rep. 394; Lees v. Nuttall, 8 Cond. Eng. Ch. Rep. 245.] And though the Court in *Boyce's Ex'r. v. Grundy*, 3 Peters' Rep. 219, admitted that, reducing a contract to writing, was, in most cases, an argument against fraud, that it was very inconclusive; and the doctrine, that a written agreement could not be relieved against, on the ground of false suggestions could not be maintained. Evidence leading to such a conclusion, will not vary the written contract; the allegations of false suggestions and immoral concealment, suppose that the party seeking relief, was entrapped in an agreement, in which he would not otherwise have entered. "This is not denying," say the Court, "that the agreement in the record was the

agreement entered into, but insisting, that it was vitiated by fraud, which vitiates every thing.

In *Hutchins v. Lee*, 1 Atk. Rep. 447, a bill was filed "to set aside an assignment of a leasehold estate, and all other the estate and effects of the plaintiff, upon a suggestion, that the same was never intended as an absolute assignment for the benefit of the defendant, but made only to ease the plaintiff of the trouble and care of managing his own concerns at that time, (being then under great infirmities of body and mind,) and subject to a trust for the benefit of the plaintiff, if he should afterwards be in a capacity of taking care of his own affairs." The assignment was absolute in its terms. The Lord Chancellor held, that, although there cannot be a verbal declaration of a trust, since the statute of 29 Chas. 2; yet, the parol evidence is proper in avoidance of a fraud, which the defendant intended to practice on the plaintiff, by attempting to deprive him of the benefit of his estate. [See also, *Watkins v. Stockett*, 6 Har. & J. Rep. 435; *Story's Eq.* 197, 8, 9, 200.]

It has been said, that the statute being intended to prevent fraud, its original design would be prevented, if it could be used as a cover under which fraud could be successfully consummated; consequently, it has been often held, that where such a result would follow the non-execution of a contract, equity would enforce, or set it aside, though its terms were not attested by writing.

In *Podmore v. Gunning*, 7 Cond. Eng. Ch. Rep. 509, the Vice Chancellor remarked, "I have always understood that the Court would interfere to prevent the obtaining an estate by fraud, notwithstanding the statute of frauds. A variety of cases might be put. Suppose a man deposes an attorney to buy an estate for him, and the attorney purchases that estate for himself; the Court would interpose, notwithstanding, the statute of frauds."

And in *Strickland v. Aldridge*, 9 Ves. Rep. 518, Lord Eldon said the statute was never permitted to be a cover for fraud upon the private rights of individuals; and though, within the intention, it cannot be said a trust is declared under these circumstances, it is clear a trust would be created upon the principle, on which this Court acts as to fraud. [See *Mucklestone*

v. Brown, 6 Ves. Rep. 69; Roberts on frauds, 79, 102; 3 Walker v. Walker, 2 Atk. Rep. 98; Barrow v. Greenough, 3 Ves. Rep. 152; Reigal v. Wood & others, 1 Johns. Ch. Rep. 406; Whelan v. Whelan, 3 Cowan's Rep. 537; Boyd v. McLean, 1 Johns. Ch. Rep. 582; Clinian v. Cook, 1 Sch. & Lef. Rep. 2; 2 Dess. Rep. 14; 2 Story's Eq. 78, 9, 746.]

In *Brown v. Lynch & Lynch*, 1 Paige's Rep. 147, it appears, that the plaintiffs were owners of a farm, which, by a fraud upon them, was mortgaged by their brother. The mortgage was foreclosed in Chancery, and the farm advertised for sale by a Master. Before the sale, the defendant agreed with the plaintiffs, to purchase in the farm for their benefit, for which he was to receive a stipulated compensation. The mortgagee in order to favor the plaintiffs, agreed with the defendant that he might bid off the property at fifteen hundred dollars. The defendant at the sale prevented others from bidding, by representing, that he intended to buy for the plaintiffs. The defendant purchased the farm at the Master's sale for fifteen hundred and forty dollars—about one thousand dollars below its value. Afterwards the defendant refused to convey the farm to the plaintiffs, or to account to them for its value, although they tendered to him the amount of his bid, with interest, and the sum agreed to be paid for his services. The Vice Chancellor having decided in favor of relief, the defendant appealed to the Court of Chancery. The Chancellor considered it was a gross fraud under the circumstances, for the appellant to hold out to the appellees, "that he was bidding off the property for their benefit, when he in fact, intended to appropriate it to his own use. If the appellant did, in fact, bid it off for them under the agreement, he held it in trust for them, and had no other interest in it, than that of a mortgagee, to secure the repayment of the purchase money, and the sixty dollars, agreed to be paid him for his trouble. But, if he had no such intention, and did not, in fact, bid off the property in trust for them, he was guilty of a fraud, which this Court will relieve against." [See *Boyd v. McLean*, 1 Johns. Chan. Rep. 582; *Pickett v. Loggon*, 14 Ves. Rep. 234; *Barnesley v. Powell*, 1 Ves. Rep. 289.] And in *Mestaer v. Gillespie*, 11 Ves. Rep.

626, Lord Eldon said, that, notwithstanding the statute of frauds emphatically declares, that a writing is essential to the validity of certain contracts; yet, it was never intended, that a fraudulent use should be made of the statute; and the cases, are perfectly familiar, in which Chancery has interfered against a party seeking thus to shelter himself, by declaring, that he shall not take advantage of his own fraud. [See *Keatts v. Rector*, 1 Arkansas Rep. 422, 3, 5, and cases there cited.]

Independent of any statutory provision, fraud does not constitute a bar to an action upon a specialty. The fraud that avoids a specialty at law, must relate to the execution of the instrument. [See *Phil. Ev. C. & H. ed.*, 1449, and cases cited; *Jackson v. Hills*, 8 Cow. Rep. 290; *Swift v. Fitzhugh*, 9 Por. Rep. 39; *Mordecai & Wanroy v. Tankersly*, 1 Ala. Rep. N. S. 100.] A defendant may give evidence tending to show, that the deed was mis-read, read but in part, or mis-expounded to him, or that one instrument was substituted for another, and thus his signature was fraudulently obtained,—this is what is meant by “fraud in the execution.” [3 *Phil. Ev. C. & H. ed.* 1449, and cases cited.] But the jurisdiction of Chancery is much more extensive. Courts of equity administer remedies for rights, in cases, in which Courts of law recognize no rights at all; or if recognized, they are left to the conscience of the parties. Trusts, technically so called, are without any cognizance at common law, and their abuse of consequence, beyond the reach of legal process. But they are cognizable in Courts of equity, and an ample remedy is there given in favor of the parties beneficially interested, for all wrongs and injuries, whether arising from negligence or positive misconduct. There are cases of losses and injuries by mistake, accident and frauds, as well as undue advantages and impositions, betrayals of confidence and unconscionable bargains; in all which, Courts of equity will interfere and grant redress; but of which the common law takes no notice, or silently disregards. [1 *Story's Eq.* 27, 8, 9: 194 *et post.*; 1 *Bla. Com.* 92; *Mitf. Pl.* 111, *et post.*]

“It may be correctly said, that the maxim, that equity follows the law, is a maxim liable to many exceptions; and that it cannot be generally affirmed, that where there is no remedy at law in the given case, there is none in equity; or, on the other

hand, that equity in the administration of its own principles, is utterly regardless of the rules of law. (1 Story's Eq. 75; Kemp v. Pryor, 7 Ves. Rep. 249, *et post*.)

Fraud is defined by the civilians to be any artifice or deception used to cheat, or deceive. This definition would however seem to embrace only actual or positive frauds. But fraud, as understood and denounced in equity, includes all acts, omissions, or concealments which involve a breach of a legal or equitable duty, trust or confidence justly reposed, which are injurious to another, or by which an undue and unconscientious advantage is taken of another. And Courts of equity will not only interfere in cases of fraud, to set aside acts done; but will also if by fraud, acts have been prevented from being done by the parties, interfere and treat the case precisely as if the acts had been done. (1 Story's Eq. 197; Chesterfield v. Jansen, 2 Ves. Rep. 155, *et post*.)

The statute of frauds is binding in all Courts, and the refusal of a Court of equity to give effect to it, according to its letter, is not influenced by any claim of right, to disregard the expressed will of the legislature, but rather from a desire to uphold the spirit of the enactment. Mr. Justice Story addressing himself to this subject says, "It is obvious that Courts of equity are bound as much as Courts of law, by the provisions of this statute; and therefore, they are not at liberty to disregard them. That they do however interfere in cases within the reach of the statute, is equally certain. But they do so not upon any notion of a right to dispense with it; but for the purpose of administering equities subservient to its object, or collateral to it and independent of it." (2 Story's Eq. 57.)

If a deed is fraudulently obtained, without consideration; or for a consideration so inadequate as to shock the conscience; or if by fraud, accident, or mistake a deed, is framed contrary to the intention of the parties, the forms of proceeding in the courts of common law, will not tolerate such an investigation there, as will enable those Courts to do complete justice. On this ground Courts of equity will restrain proceedings at law, until a full inquiry has been made. And if it appears that the deed has been improperly obtained; or that it is contrary to the inten-

tion of the parties in their contract ; they will in the first case compel a delivery and cancellation of the deed, and make such further order, as may be necessary to dissolve the contract, and place the parties *in statu quo*. In the second case, they will either rectify the deed according to the intention of the parties ; or will restrain the use of it, in the points in which it has been framed contrary to, or has gone beyond their intention in the original contract. (1 Story's Eq. 418-9.

It has been said, that such is the abhorrence with which fraud is viewed at common law, and such the solicitude of Courts of equity to suppress it, that they have repeatedly declared they will not undertake to enumerate the cases, of which, upon a suggestion of fraud, they will take jurisdiction. (1 Story's Eq 196 and note.

Lord Hardwicke in his celebrated judgment in *Chesterfield v. Jansen*, 2 Ves. Sr. Rep. 155, says equity has an undoubted jurisdiction to relieve against every species of fraud ; and that fraud may be presumed from the circumstances and situation of the contracting parties ; and may be apparent from the intrinsic nature and subject of the bargain. (*Woodhouse v. Brayfield*, 2 Vern. Rep. 307.

Among the acknowledged grounds of equity jurisdiction, is the fraudulent prevention of acts to be done for the benefit of third persons ; Courts of equity will take from a party, the benefit which he may have derived from his own fraud, imposition, or undue influence in procuring the suppression of such acts. Wherever the relief sought arises from the fraud and imposition of the defendant, it "has nothing in the world to do with the statute of frauds and perjuries." (*Walker v. Walker*, 2 Atk. Rep. 99 ; *Devinish v. Baines*, Prec. in Chan ; *Chamberlain v. Chamberlain*, 2 Freem. Rep. 34 ; *Driver v. Fortner*, 5 Porter's Rep. 9.)

In *Young v. Peachy*, 2 Atk. Rep. 254, it appears there was settled on Zaccheus Bredon by the will of his father certain houses in London, remainders to his sons in tail, remainder to his daughters and the heirs of their bodies. Zaccheus had no sons, but had two daughters, Margaret and Lydia. Margaret intermarried with Joseph Fox, who became very extravagant

and in very bad circumstances. Zaccheus desiring to prevent the property, in the event of his death, going into the possession of Fox; represented to his daughter, that it would be for her benefit to join in a common recovery of a moiety of the premises, and desired her to persuade her husband to join in the same, and by a deed to be made thereupon, declaring such recovery to be to the use of Zaccheus and his heirs; this moiety would be protected from the creditors of Joseph Fox; and at the same time promised Margaret, that he would take the estate, so to be created by the recovery and deed, and declare the uses thereof, as a trustee only, for her and her heirs, and that the operation of law would be such thereupon, he not paying any consideration for the same, and that he would not claim or insist upon any advantage therefrom. A recovery was accordingly suffered and declared by a deed (Margaret and her husband being parties) to be to the use of Zaccheus and his heirs, but no consideration was paid by him, or any one on his behalf to his daughter and her husband.

Zaccheus from the time the recovery was suffered, constantly paid to Margaret an annuity of thirty pounds *per annum*. Afterwards Zaccheus became a bankrupt, and Sir Robert Peachy and others were chosen his assignees. Zaccheus died, and not long thereafter Margaret and her husband died without issue, intestate.

Lydia and her husband filed a bill against the assignees, and a mortgagee under a mortgage from Zaccheus, after the recovery suffered, praying amongst other things, that the recovery might be set aside as unduly obtained, and that in consequence of this, the plaintiff might be allowed to redeem the mortgage, as entitled in remainder under the will of Zaccheus' father.—The plaintiffs consenting that the thirty pounds *per annum* paid Margaret, should be refunded; the Lord Chancellor was of opinion that the recovery ought to be set aside as unduly obtained; and in consequence of this, the plaintiffs were entitled to redeem the mortgage.

Relief was granted, not upon the ground of the absence of a consideration, moving from Zaccheus to Margaret and her husband: for "his Lordship said, the plaintiffs could not be re-

lieved on the motion of a trust; however, he thought they had a proper ground to be relieved upon, under the head of fraud."

"It manifestly appears," continued his Lordship, that "the conveyance from Fox and his wife, was obtained in order to answer one particular purpose; but that the father has attempted to make use of it for a very different purpose; and there having been a great many cases, even since the statute of frauds, where a person has obtained an absolute conveyance from another, in order to answer one particular purpose, but has afterwards made use of it for another, that this court has relieved under the head of fraud; for a practice of this sort is a deceit and fraud, which this court ought to relieve against; the doing it, is *dolus malus*, and that appears to be the present case."

Upon the same principle, if a legatee promises a testator, if he will make a disposition in his favour, he will transfer the subject of the bequest, or demise, to a third person, the person making the promise will be obliged in equity to a performance. [Drakeford vs. Wilks and others, 3 Atk. Reports, 539; Chamberlain vs. Agar, 2 Vesey & Beames' Rep. 259; Podmore vs. Gunning, 7 Sim. Rep. 644; Reach vs. Kennegal, 1 Ves. Sr. Rep. 124; Ambler's Rep. 67; Thynne vs. Thynne, 1 Vern. Rep. 296; Oldham vs. Litchfield, 2 Vern. Rep. 504; Barrow vs. Greenough, 3 Ves. Rep. 152; Goss vs. Traceby, 1 P. Wms. Rep. 288; Luttrell vs. Lord Waltham, cited in the case of Huguenin vs. Basely, 14 Ves. Rep. 290.]

In the Lessee of Thomson et ux vs. White, 1 Dall. Rep. 424, the facts were substantially as follows: Dorothy Gordon, being seised in fee of a moiety of the premises in question, intermarried with Lawrence Saltar; and having lived long with him without any prospect of children, she was desirous of making a provision for an only sister of the whole blood, one of the lessors of the plaintiff, whose husband, the other lessor, was much reduced in his circumstances. Mrs. Saltar being upon a visit to her husband's brother, John Saltar, at some distance from their residence, was taken sick; and after a conversation relative to her estate, it was agreed by her husband and herself, that it should be settled on them for their lives,

and for the life of the survivor of them and afterwards it should go to her sister the lessor, and her heirs lawfully begotten; and in default of such heirs to the children of her three sisters of the half blood. A deed was accordingly drawn to that effect; but upon its being read to her, she thought the expression "heirs of her body," indelicate, as applied to an unmarried sister of the half blood, and for that reason refused to sign it, notwithstanding the persuasions of her friends. Whereupon her husband proposed to her, that a deed should be drawn from them to his brother John, who, with his wife, should convey the premises to him and herself as joint tenants in fee; and he promised as soon as he got home he would make his will, or in some other way settle the estate in the manner projected,—Mrs. Saltar hesitated at this proposition, but on her sister telling her that "she might rely upon him—for if there was a man in the world, who could be trusted in such a case, it was him;"—and on her husband requesting her to comply, declaring that "if there was faith or truth in man, he would honestly perform what he again promised." She executed the deed to John Saltar, who, with his wife, reconveyed the estate according to the previous stipulations. Mrs. Saltar died about six months after the deeds were executed; and her husband died intestate and without issue, about eighteen months after her decease. Lawrence Saltar, during his life, managed the estate as if it had belonged to the lessors of the plaintiff. In his last sickness, indeed, when near expiring, he told his brother that he was very uneasy on account of his leaving no will; and soon after this declaration he lost his reason. The question was whether this evidence was admissible.

The court remarked, that since the statute of frauds, it had been a general rule that no estate, or interest in lands, shall pass, but by deed or some writing signed by the parties; and that parol evidence is inadmissible to contradict, add to, diminish or vary a deed or writing. But it was admitted that to this rule there were exceptions. For instance, where a declaration is made before a deed is executed, shewing the design with which it was executed; the decisions in the court of chancery have been grounded upon parol proof of a single witness against a deed of settlement. And in cases of fraud and trust, it was

said that parol evidence had been admitted to show that a deed absolute in its terms was intended to be in trust. [Hampton vs. Speneer, 2 Vern. Rep. 288.]

The court said further, that the statute of frauds should be beneficially expounded for the suppression of frauds; and where there had been a fraud in obtaining a conveyance from another, the grantee might be considered as a mere trustee.— [Loyd vs. Spillet Barnard, in Can. 388.] The parol evidence was held to be admissible,*on the ground that the breach of trust in Lawrence Saltar was a *fraud in law*, which was not within the act; and a judgment was entered for the plaintiff. Here it may be observed, that there was no proof from which an actual fraud could be imputed to Lawrence Saltar; for he always managed the property as if it belonged to the lessors of the plaintiff; and even *in extremis* expressed uneasiness that he was about to die without having made a will. Yet the court considered the failure to perform the promise made to his wife to be a fraud in law, and wrested the property from his heirs.

And in Keatts vs. Rector, 1 Arkansas Rep. 391, it was alleged in the bill, that Rector bought a certain tract of land at auction, and afterwards agreed to permit Keatts to become equally interested with himself in the land, and to receive the deed in his own name, upon condition that he should pay the purchase money, and should reconvey to Rector an undivided moiety, upon his applying therefor in a reasonable time and paying half the purchase money and interest, and half the value of all improvements. The court decided, that Keatts should reconvey according to his contract, although it was not evidenced by writing; and he pleaded the statute of frauds.

But it has been argued for the plaintiffs in error, that it is not allowable to show by parol proof, that the deed of December, 1824, from William E. to Joshua Kennedy, was made upon a secret trust, or that the land conveyed by it, should be disposed of in any other manner, than the grantee might think proper. That such evidence was inhibited by the statute of frauds and perjuries, which declares, that no action shall be brought, whereby to charge any person upon any contract for the sale of lands, tenements, or hereditaments; unless the pro-

mise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person, by him, thereunto lawfully authorized. [Aikins' Digest 206, 7.]

And further, that the deed expressing upon its face, a specific monied consideration, and nothing else, it was not permissible to show, that there was any other inducement moving from the grantee to the grantor.

To sustain the first branch of the argument, many authorities have been cited.

The first we will examine, is the case of Lord Irnham v. Child & others, 1 Bro. Ch. Rep. 92. The facts of that case, are these: Lord Irnham treated for an annuity with Child, (who, though, unknown to Lord Irnham,) was an agent for H. Lawes Luttrell, his Lordship's eldest son. It was agreed, that the annuity should be redeemable; but both parties supposing, that if this appeared upon the face of the transaction, it would make it usurious, it was agreed, that the grant from Lord Irnham to Child, should not have in it a clause of redemption. The grant being drawn and executed according to the agreement, and the annuity assigned by Mr. Luttrell to others of the defendants, Lord Irnham filed his bill to redeem, alledging, that such was the agreement, although, for the reason stated, it did not appear upon the deed.

The Lord Chancellor, considered the rule perfectly clear, both upon the statute and at common law, that where there is a deed in writing, it will not admit of parol evidence of a contract, which is not part of the deed. If the contract reduced to writing had been varied by fraud, from the agreement of the parties, the evidence would be admissible; the Court would not, in that case, overturn the rule of equity, by varying the deed; but it would be an equity *dehors* the deed. But it having been agreed by both parties, not to introduce the clause of redemption, the deed executed was such as the parties understood and intended it to be; and the Court rejected the parol proof.

In delivering his opinion in the Marquis Townsend v. Stangroom, 6 Ves. Rep. 331, Lord Eldon said, "upon the question

as to admitting parol evidence, it is perhaps, impossible to reconcile all the cases. *Lord Irnham v. Child* went upon an indisputably clear principle, that the parties did not mean to insert in the agreement, a provision for redemption; because they were all of one mind, that it would be usurious; and they desired the Court not to do what they intended; for the insertion of that provision was directly contrary to their intention, but they desired to be put in the same situation, as if they had been better informed, and consequently, had a contrary intention. The answer is, they admit it was not to be in the deed; and why was the Court to insert it, where two risks had occurred to the parties; the danger of usury, and the danger of trusting to the honor of the party." Whether the insertion of the clause of redemption in the deed, would have made the transaction usurious, there was an intention to evade the statutes against usury, and a reliance by *Lord Irnham* upon the personal honor of *Child*; for these reasons, the rejection of the parol evidence was considered by *Lord Eldon* to have been proper.

The case of the *Marquis Townsend v. Stangroom*, does not maintain the inadmissibility of parol proof, to establish the fraudulent use of a deed; or that a party receiving an absolute deed, upon a promise that he would dispose of the property conveyed by it, for a particular purpose, refused to perform his promise. But it shows, that Courts of equity receive such proof in some cases, in which Courts of law do not.

In *Leman v. Whitley*, 3 Cond. Eng. Ch. Rep. 736, it appears, that the son conveyed an estate to his father, in consideration, as it was expressed in the deed, of £400, paid by the father to his son, the plaintiff. The bill alledged, that the plaintiff not being in good credit, but desirous of raising money upon a mortgage of this estate, was advised by an attorney, employed as well by the father, as the plaintiff, that he could much more readily procure the money on mortgage, if it appeared, that the estate on which the security was to be given, was the father's property, and that the money was raised for the use of the father, who was in good credit, than if the transaction was understood to be a dealing with the plaintiff; and, therefore the attorney recommended, that the plaintiff should

convey the estate to the father, so that it should appear to be his property. In pursuance of that advice, deeds of lease and release were made and executed to the father with his consent; but no part of the alledged consideration was paid.

The father died about five months thereafter, having, by his will, made subsequently to the deeds of lease and release, devised all his real estate in general terms, to an infant son of the plaintiffs, with remainder over.

The attorney had taken steps towards raising money on mortgage in the name of his father; but no mortgage was completed in his lifetime. The facts were admitted by the answer of the attorney, who was made a defendant to the bill; and they were also proved by his deposition.

The bill prayed that the devisees of the father might be declared to be trustees for the plaintiff; that they might account to him for the rents and profits since the father's death; and that the estate might be re-conveyed to him. The question was, as to the admissibility of the parol evidence.

The Master of the Rolls thought that there was no pretence of fraud, nor any misapprehension of the parties with respect to the effect of the instruments. It was intended that the father should, by legal instruments, appear to be the legal owner of the estate; and to allow the trust to be established by parol evidence, would repeal the statute of frauds. The case was then considered as a purchase from the plaintiff by the father; and it being stated and proved, that no part of the consideration of £400 was ever paid by the father, it was held that the plaintiff was entitled to a lien on the estate for that sum.

And in *Morris v. Morris*, 2 Bibb's Rep. 311, it was held, that a verbal promise from a son to a father, at the time of receiving a conveyance of land, to execute and deliver a bond to a third person, conditioned for the conveyance of one-half of the estate to the infant children of another son, could not be enforced in equity.

In respect to the case of *Leman v. Whitley*, Mr. Justice Story remarks, that it stands upon the utmost limits of the doctrine of the inadmissibility of parol evidence as to resulting trusts; and it will be seen that both that case and *Morris v. Morris* are

opposed to several of the authorities cited above; especially, the Lessee of Thomson et ux v. White.

The second branch of the argument supposes it not permissible to vary, by parol proof, the character of the consideration expressed. To sustain this conclusion, several decisions have been referred to. The case of Mead v. Steger, 5 Porter's Rep. 498, it is insisted, is decisive of the point. That was a cause at law; and it was not pretended that fraud was imputable to the plaintiff. The Court held, that parol proof of another and different consideration than that expressed, was inadmissible; but stated some of the cases in which such evidence would be received in a Court of law, in addition to, and in contradiction of, the writing. In a suit in equity, where fraud is charged, it cannot be regarded as an authority.

In Young v. Peachy, 2 Atk. Rep. 255, the Chancellor, in setting aside the recovery which had been suffered, laid stress upon the generality and looseness of the terms in which the consideration was expressed; and says it follows from thence, that it is competent for the parties to aver any other consideration. In that case, there was no allegation or proof of fraud in fact; and though we infer from the reasoning of the Chancellor, that he would, upon other grounds than that stated, have admitted the evidence; yet he doubtless considered that his opinion acquired strength by calling to his aid a principle, which even Courts of law acknowledge.

In Watt v. Grove, 2 Sch. & Lef. Rep. 500, Lord Redesdale, speaking of the conclusiveness of deeds, says: "Solemn instruments, duly executed, are *prima facie* conclusive on the parties. Where they state truly the transactions on which they are founded, they are binding in equity, as well as at law, if the consideration stated is sufficient for the purpose. But if it appears, that transactions are not truly stated, the instruments may lose all their binding quality in equity, even if conclusive at law. Instruments may be so wholly false and fraudulent, that they may be avoided at law and become mere nullities. A court of law can hold no middle course. But if instruments are impeached in equity, the party who seeks to avoid them, although he may demonstrate that they are false and fraudu-

lent, that they do not contain the real dealing between the parties, yet resorting to a Court of equity for relief, he must submit to the rule of equity, and in the language of the Court, must himself do equity." Now here is a decision directly upon the question we are examining. All the authorities cited to show that where fraud is proved, a deed shall be set aside, or in the case of an absolute deed, equitable relief shall be administered, proceed upon the idea that the consideration expressed, is inconclusive. So the decisions which maintain that an absolute deed may be turned into a mortgage, whether they require proof of fraud or not, impliedly admit that the statement of a specific consideration interposes no barrier to the administration of an extrinsic equity. *Slocum & wife v. Marshall et al.*, 2 Wash. C. C. Rep. 397; *Dane's Ab. Ch. 9 art. 1 sec. 4.*

It was argued for the plaintiffs in error, that even conceding the complainants were entitled to relief upon proof of fraud, yet the Court could not extend its decree so far as entirely to annul the deed of December, '24. That the only redress which the complainants could claim, was the recovery of the amount of the consideration expressed in the deed, (if unpaid,) with interest thereon. In refusing to set aside deeds for land upon an allegation of fraud, Courts have sometimes treated the complainant as a vendor, and upon proof that the purchase money was not paid, have given him the benefit of an equitable lien on the land for its recovery. See *Leman v. Whitley*, cited above; to which might be added other cases to the same effect. But in *Boyce's ex'rs. v. Grundy*, 3 Peter' Rep. 220, which was a suit in equity, by a purchaser, to be relieved from a purchase of land, on the ground of a fraudulent misrepresentation by the seller, the Court remarked, "It has been further argued, that the misrepresentation, if at all established, was but of a personal character, and susceptible of compensation, or indemnity, to be assessed by a jury. On this, there may be made several remarks; and first: That if the facts made out such a case, yet the law, which abhors fraud, does not incline to permit it to purchase indulgence, dispensation, or absolution." And this, both upon principle and authority, we consider the true doctrine. [See also *Podmore v Gunning*, 10 Cond. Eng. Ch. Rep. 242.]

It was further objected by the plaintiffs, that the bill does not charge Joshua Kennedy with having been guilty of a fraud, either in inducing Wm. E. Kennedy to execute the deed of December, '24, or in using it for a purpose other than that contemplated by the agreement of the parties.

It was not necessary to alledge the commission of a fraud *in totidem verbis*. If the bill states, with distinctness and precision, facts and circumstances which in themselves amount to a fraud, it is quite as unobjectionable, as if the very term itself was employed.

In Whelan v. Whelan, 3 Cow. Rep. 576, which was a bill to set aside two conveyances of land, on the ground of undue influence and fraud, it was objected, that the pleadings were not sufficiently explicit to admit proof of undue influence. But the Court said, "The bill charges the respondents with fraudulent artifices, management and undue influence, in obtaining the deeds. It is however sufficient if, from an examination of the whole bill, the facts shew that the respondents' necessarily had undue influence or control over the appellant, so that the appellant did not treat on equal terms. The rule that requires every thing essential to the appellants' right to be alledged, is then satisfied. His equity will then appear, and the Court may administer the relief to which he is entitled." To the same effect, see Story's Eq. Pl. 212.

While it is proper that every material fact to which the plaintiff means to offer evidence, should be distinctly stated in the *premises*, a general charge or statement is sufficient. It is not necessary to charge minutely all the circumstances which may tend to prove the general charge; for these circumstances are matters of evidence, and need not be charged with particularity. [Story's Eq. Pl. 24-5; Smith v. Burnham, 2 Sumner's Rep. 612.]

It is stated in the bill, that William E. Kennedy died on the 9th May, 1825, at the house of Joshua, his brother—That after the death of his wife, (which occurred three or four years previously,) himself and children, with the exception of Delphine, went to reside with Joshua—That William at all times reposed great confidence in the honesty, integrity and faithfulness of his brother, who was in the habit of acting as his agent, con-

sulting and advising him in all things as to the management and disposition of his property—And after the death of his wife, Joshua assumed the place of guardian to him during life.

In the latter part of his life, William became intemperate, and was frequently intoxicated; and when in that condition, would convey his property without any, or for a very inadequate consideration, to any one who would ask him.

It is further stated, that Joshua, together with other relatives of William, after consultation, came to a conclusion that it would be best to advise him to convey his property, or the greater part of it, to Joshua; and that after repeated solicitations by them, he executed the deed of December, 1824. That deed, though absolute on its face, and purporting to be for a moneyed consideration paid in hand, was made in trust for the children of William, without any other consideration than confidence in Joshua, and so admitted by him up to a short time previous to the commencement of this suit. The deed was not recorded until November, 1828. The bill then states some circumstances tending to show that the means of Joshua could not have been very great; and alledges, he could not have paid ten thousand dollars, or any considerable part of it. It is also averred, that the expenditures of William from December, '24, to May, '25, were not extravagant; and that he left but one hundred and one and eighteen one hundredths dollars in cash at the time of his death.

It is stated, that Joshua received the conveyance from William upon an assumption and promise, that the property conveyed should be held or disposed of in trust for the children of the latter; that notwithstanding all which, he failed during his life to convey it to the children, or otherwise dispose of it for their benefit, but asserted an absolute title in himself.

The facts recited clearly amount to an allegation—1. That William was very much under the influence of Joshua, in the management of his property, at the time the deed of December, 1824, was executed. 2. That Joshua and other relatives advised William, as a means of securing his property to his children, to execute that deed; that it was executed under the influence of an assurance from Joshua, that the property should be held and disposed of for the benefit of the children; that he

not only failed to perform his promise, but set up a title in himself. That these allegations are equivalent to a direct and positive charge of fraud, it seems to us is scarcely disputable.

It was argued for the defendants in error, that the great confidence which William manifested in the integrity and prudence of Joshua, and the control which Joshua seems to have exercised over him and his property, should go far to warrant the conclusion, that William was overreached in executing the deed of '24. There was certainly no confidential relationship, such as trustee and *cestui que trust*, principal and agent, &c., existing between the parties, from which Courts of equity are apt to presume fraud. (2 Phil. Ev. C. & H.'s ed. 301, 336 -7.) But even if Joshua could be regarded as occupying such a relation to William, yet he might have made a purchase of him, if he made a full and fair disclosure of his knowledge, and took no improper advantage. [Randall v. Errington, 10 Ves. Rep. 442; Lord Selsy v. Rhoades, 1 Cond. Eng. Ch. Rep. 339; Lovell v. Briggs, 2 New Hamp. Rep. 218; Bolton v. Gardner, 3 Paige's Rep. 273.]

But it is said there are other relations of a miscellaneous character, from which Courts of Equity have gone far in presuming fraud. To this point, Whelan v. Whelan, 3 Cow. Rep. 537, is a leading case. There it appears that a man aged 74 years, whose wife was sickly and irritable, was troubled for several years with dissensions among his children about the management of his property—his wife taking part with all his children on one side, except two of his sons, who took part with him. The dissension was so great, that the wife, and children taking part with her, departed, leaving the husband and two sons with him. The father being sued for a debt contracted by his wife, became alarmed by a belief that she would dissipate his estate; one of his sons induced him to convey to them in fee more than nine thousand dollars of real and personal property—they agreeing to secure to him and his wife a maintenance and fifty dollars a year for life. Among other grounds on which the conveyance was set aside, it was held to be void, as being caused by fraud, undue influence and unfounded alarm, excited or countenanced by the son. The doctrine in regard to undue influence exercised by a vendee, is most ex-

tensively examined in the learned arguments of counsel and in the opinion of the Court; and it was decided, that "a conveyance obtained by children from a father, will not be sanctioned by a Court of equity, if it appear to have been caused by an abuse of confidence reposed by him in his children, who for the purpose of procuring it, took advantage of his age, imbecility and partiality for them"; more especially, if the consideration is inadequate.

In *Slocum & wife v. Marshall et al.*, 2 Wash. C. C. Rep. 397, it appears that a daughter, at the request of her father, had made a conveyance of her real estate to him, under the belief that her interest would be thereby promoted, and that the property conveyed would become hers after the death of her father. But the operation of the conveyance was to deprive the daughter of the estate. The Court decreed a re-conveyance of the property, and an account of the proceeds of the part which had been sold, so as to effect the justice of the case, and to give to the daughter the property to which she would have been entitled if no conveyance had been made. The Court thought there was abundant evidence in the cause to repel the imputation of a fraud intended by the father; but thought it obvious that the conduct of the daughter in the affair was influenced altogether by his declarations and advice, in which she appeared to "have placed the most implicit and respectful confidence." Yet as the conveyance, instead of being promotive, was destructive of her interest, the relief sought against the act of the daughter was granted.

The case cited is an authority to show, that where one who is so much under the influence and control of another as to regard his advice as almost authoritative, is induced to make a deed for land to that other, under the promise of some benefit which is never received, the deed will be set aside, although a positive fraud is not shown. And if precedent has ascertained the law correctly on this point, there can be no doubt but the undue exercise of an influence resulting from confidence and friendship, exerts great potency upon an application to equity to rescind a contract. The doctrine being, says Mr. Justice Story, that wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to

sacrifice those interests which he is bound to protect, he shall not be permitted to hold any such advantage. [1 Story's Eq. 319-20.] The reason of the doctrine being this, that while one party has been put off his guard by his confidence, the other by the aid of that confidence, has gained an advantage, that would not have been voluntarily yielded to him. [Hall v. Perkins, 3 Wend. Rep. 626; Gore v. Summersall, 5 Monroe's Rep. 505; Bates v. Graves, 2 Ves. Rep. 287; Ex parte Fearon, 5 Ves. Rep. 644; Norton v. Kelly, 2 Eden's Rep. 286; Watkins v. Stockett, 6 Har. & John's Rep. 442; Watt v. Grove, 2 Sch. & Lef. Rep. 492; Young v. Peachy, 2 Atk. Rep. 258; Purcell v. McNamara, 14 Ves. Rep. 91.]

It was further insisted for the plaintiffs in error, that the Chancellor should have sustained their demurrer to the bill on the ground that it was multifarious in seeking by the same suit to set aside the deed of 1824 from William to Joshua Kennedy, and to obtain a settlement of the accounts of the latter as the executor of the will of William—that though the heirs were necessary parties to a contestation upon the first branch of the complaint, yet the executors could only be called upon to answer the latter.

In a litigation respecting the real estate of a testator or intestate, it is necessary that the heirs should be parties; and perhaps where the powers given to the executors are as extensive as those conferred by the will of Joshua Kennedy, the executors should be joined as defendants in equity. But in order to coerce a settlement of the accounts of an executor, his executor is the only necessary party, inasmuch as the personal estate is primarily liable to the payment of what may be found due.

In the case under consideration, the amount of the decree in money must depend upon the fact, whether the deed of December, '24, is set aside as being intended for the benefit of the children of William; for the bill alledges that considerable sums of money have been received for rent of the property conveyed. The question then is, shall the validity of that deed be tried in a separate suit, and in the event it is set aside, the accounts of Joshua as executor be finally adjusted in a proceeding against his executors.

Equity delights to prevent multiplicity of suits; and with that view, frequently entertains bills by complainants, between whom there exists no privity of contract; and against defendants, between whom there exists no connection whatever, except a community of interest. Thus it is in the case of a bill by creditors, to subject a fund to the payment of debts, and of "bills of peace" generally.

The first branch of the argument upon this point assumes it as a correct principle, that distinct matters cannot be united in the same suit. This "proposition, if carried to its full extent, would go to prevent the uniting several instruments in one bill, although the same parties were liable in respect of each, and the same parties were interested in the property, which was the subject of each." "It would be extremely mischievous if such a rule were established, in point of law. No possible advantage could be gained by it, and it would lead to multiplication of suits in cases where it could answer no purpose to have the subject-matter of the contest split up into a variety of separate bills." (Campbell v. Mackay, 1 Milne & Craig's Rep. 603.)

The objection of multifariousness, it is said, must be confined to cases, where the case of each defendant is entirely distinct and separate in its subject-matter from that of the other defendants; for the case against one defendant may be so entire, as to be incapable of being prosecuted in several suits; and some other defendant may be a necessary party to some portion only of the case stated. In the latter case, multifariousness would not be an available objection. [Story's Eq. Pl. 2nd ed. 225; Attorney Genl. v. Craddock, 3 Milne & Craig's Rep. 85.]

It is indeed difficult, if not impracticable, to reconcile all the decisions on this subject, or to educe from them general rules by which to test the objection. Without attempting to cite them, it may be said with truth, they are extremely various; the Courts seeming to be influenced by what was convenient and just in the particular case, rather than lay down any inflexible rule; always discouraging the objection, where, instead of advancing, it would defeat the ends of justice.

By the term multifariousness, as applied to a bill, we are to understand, that a defendant has been made a party, though he has no connection with a large portion of the case stated in the bill. [See Story's Eq. Pl. 407, 2nd ed., note.] But where there is a common liability in the defendants and a common interest in the plaintiffs, different grounds of complaint may in *general* be united in one record.

But it is said that although the plaintiffs and defendants are parties to the whole transactions which form the subject of the suit, yet those transactions may be so dissimilar, that the Court will not allow them to be joined together; but will require distinct records. [Story's Eq. Pl. 406, 2nd ed.]

In *Kensington v. White*, 3 Price's Rep. 164., a bill was filed by seventy-two underwriters to restrain several actions on different policies effected upon different ships. The defendants had a common interest in all, because they were the owners of the ships and plaintiffs in all the actions; but here were seventy-two individuals all not only liable to separate actions, but actually defendants in separate actions, united together against the parties who were plaintiffs in all the actions, for the purpose of obtaining by one bill a discovery in aid of the defence against all the actions; yet the Court of Exchequer held, that the suit was not multifarious.

After an extensive examination of the subject, Mr. Justice Story says: "The conclusion to which a close survey of all the authorities will conduct us, seems to be that there is not any positive inflexible rule as to what, in the sense of Courts of Equity, constitutes multifariousness, which is fatal to the suit on demurrer. These Courts have always exercised a sound discretion in determining whether the subject matters of the suit are properly joined, or not; and whether the parties, plaintiffs or defendants, are also properly joined, or not. And it is not very easy, *a priori*, to say what is, or what ought to be, the line regulating the course of pleading on this point. All that can be done in each particular case, as it arises, is to consider whether it come nearer to the class of decisions, where the objection is held to be fatal, or to the other class where it is held not to be fatal. And in new cases, it is to be presumed that the Court will be governed by these analogies

which seem best founded in general convenience, and will best promote the due administration of justice, without multiplying unnecessary litigation on the one hand, or drawing suitors into needless and oppressive expenses on the other." And such is substantially the language employed by Lord Cottenham, in *Campbell v. Mackay*, 1 Milne & Craig's Rep. 603.

The object of the rule against multifariousness, says Lord Cottenham, is to protect a defendant from unnecessary expense. (*The Attorney Genl. v. Craddock*, 3 Milne v. Craig's Rep. 85.) In the case at bar, by uniting in the same record the heirs and executors, instead of increasing the expense, such a consequence will be prevented. So long as the executors have assets to pay costs, it is unimportant to them *individually* what the amount of costs may be; but to the heirs, it is all-important, as their ancestor's estate must ultimately contribute to its payment. Again; by contesting the validity of the deed, and asking an adjustment of the accounts of William Kennedy's executor in the same suit, a final settlement and division of the estate of Joshua Kennedy will be expedited. So that upon the score of expense, as well as the speedy administration of justice, the plaintiffs are really benefitted. Upon this consideration then, as also the fact that the settlement of the accounts of Joshua Kennedy as executor are intimately connected with the controversy in respect to the deed, we are of opinion, that the bill is not objectionable for multifariousness. (Story's Eq. Pl. 224 to 234, and 405, '6, '7—412 '13, '14, 2nd ed. and cases cited.) This view closes our opinion upon the law of the case, and we are now to consider the second question raised, which opens an inquiry into the facts.

Second: The lands conveyed by the deed of December, 1824. are such parts of the McVoy and Price grants, (as they are designated,) as then belonged to William E. Kennedy. These grants emanated from the Spanish authorities exercising jurisdiction over the city of Mobile and country adjacent, at the periods of their respective dates.

The land embraced by the grant to William McVoy, was conveyed by the grantee in 1814 to William and Joshua Kennedy jointly.

In 1798, Thomas Price obtained his first grant from Gov. Gayoso for six hundred arpents of land.

On the first of September, 1806, Joshua, as the agent of Thomas Price, petitioned the Intendant General at Pensacola for five hundred arpents of land, "by way of sale." The petition was granted, and the usual order made for a survey.

On the 20th November, 1806, Price, by his memorial addressed to the Commandant at Mobile, admitted that he had appointed Joshua an agent at Pensacola to obtain for him a further grant of five hundred arpents of land, in consideration of the arrears of his salary for three years as interpreter, and of other claims which he had on the Government. But he disavowed the authority of Joshua to purchase lands for him; and stated, that the land granted upon the petition by Joshua, was embraced by the grant made by Gov. Gayoso in 1798, and solicited in consideration of the premises, a grant for five hundred arpents adjoining the then town of Mobile, (the boundaries of which he particularly described.) The memorial was granted by the Commandant, and confirmed by the Intendant General of Pensacola, who directed the usual order for a survey to be issued. This tract, on the 22d November, 1806, was conveyed by Price to William E. Kennedy; and on the 24th of the same month, he made to William an irrevocable power of attorney to cause the necessary survey to be made. The consideration of this deed was two hundred dollars.

On the 25th August, 1813, Price executed a deed to William for the land granted by Gov. Gayoso in 1798; which deed recited as its consideration the sum of five hundred dollars paid by the latter to the former. Both the grants to Price were confirmed by Congress after the death of William E. Kennedy.

It is argued for the plaintiffs in error, that although William received conveyances from Price for the two grants to him, yet the purchase was made by William for the benefit of, and with the money of Joshua—that the latter not being a Spanish subject, was not authorized to purchase lands within the territory of Spain, while Wm. possessed the necessary qualifications; and therefore he acted as his agent. If this argument was sustained by proof, a resulting trust would probably have arisen

in favor of Joshua; but so far from being sustained, the evidence against such a conclusion strongly preponderates.

The deeds from Price to William are *prima facie* evidence (and conclusive until disproved) that the purchases by William were made on his own account and with his own means; and opposing evidence should not be merely conjectural, but clear and satisfactory.

It may be that Joshua Kennedy was not authorized to purchase land within the dominions of the king of Spain, as has been suggested. Be this as it may, the record shows, that in the year 1806, he received several conveyances before the Spanish Commandant at Mobile for lands within or contiguous to that city.

Between the years 1815 and '20, William conveyed small portions of the Price grants to Joshua, at different times. In some of the deeds, the consideration expressed is money paid—in others, the general terms, "valuable consideration." And on the 20th November, 1818, he conveyed to Joshua eighty arpents of land, part of the Price grant, in consideration "of the sum of five hundred dollars to me (him) formerly paid at the time of purchasing a tract of land from Thomas Price by William E. Kennedy." William also made nearly one hundred deeds to other persons to portions of the Price tracts, between the years 1817 and the latter part of 1824; and during the same period, some portions of the land were conveyed by William and Joshua jointly, and some by Joshua individually.

In 1818 or '19, it appears that a deed dividing the Price tracts between William and Joshua, was executed by them. The deed was accompanied by a map prepared by one Mathews, on which the lots set apart to each, were marked with the initials of their names respectively. The deed was not produced at the hearing, nor any proof offered as to its existence or loss; but a map, the counterpart of that supposed to have been made by Mathews, is still extant, and forms a part of the record of the cause.

Again; although some of the witnesses go so far as to express the belief, that William's purchase of Price was made for Joshua, yet there are others who express an opposite opinion, and state, that William was able to have paid for the land.

without the aid of Joshua. Sefroy Dolive, a connection, and doubtless intimately acquainted with William's business, says confidently and almost positively, that the purchase was made by and for William individually.

Thus stands the question upon the proof; and we think that, apart from the potency to be accorded to an absolute deed in the scale of evidence, the circumstances greatly preponderate against a resulting trust for Joshua.

Let it be conceded that, in consequence of a want of citizenship in Joshua, he could not have purchased the land granted to Price during the continuance of the Spanish Government, and still it will avail him nothing. That cause did not exist in August, 1813, at the time William received the conveyance for five hundred arpents; for the Spanish had given place to the American flag in April of that year; and the ordinance of Congress and the legislative acts of Mississippi became the law of property; and consequently the right of Joshua to hold land, undoubted.

Can it be supposed, that a man so well informed of his rights, and watchful of his interest as Joshua Kennedy, would not, if William had been his agent in 1806, as soon as the Spanish Government had ceased to exist, have endeavored to obtain an absolute conveyance from him. But the record, instead of authorizing the inference, that the beneficial interest was in Joshua, tends to a different conclusion; for between 1815 and '20. Joshua received conveyances for money and other valuable consideration from William, for small portions of the Price grants. These deeds are, at least presumptive evidence of the facts recited, and are recognitions of the proprietorship of William, and of his right to sell.

The consideration of both deeds from Price to William, is stated at seven hundred dollars—two hundred for one, and five hundred for the other. In 1818, we have seen that a deed was made from William to Joshua, for eighty arpents of land, in consideration of five hundred dollars, paid by Joshua to William, at the time the latter purchased "a tract of land from Thomas Price." Now suppose, that Joshua had actually advanced to William the sum stated, it does not follow, that the latter agreed to invest it in land for the benefit of the former;

but even, if there was such an agreement, did not Joshua absolve William from all obligations to perform his promise, by receiving payment in the eighty arpents of land conveyed to him? Such, at least, is the natural conclusion.

But if it be true, that William's purchases of Price were made for Joshua, and with his money, why did Joshua execute with William a deed of partition to the Price tracts, and cause a survey and map, to be made to designate the property of each. If, entitled to all, why receive a deed for a part. Here, we think, was a distinct recognition, that William was entitled to a moiety of these lands, which then remained unsold.

It was, however, said, that Joshua must have been the owner of the Price tracts, previous to the execution of any deed by William to him, or he would not have conveyed portions of it in fee-simple. The conclusion by no means follows the premises. None of these deeds are made to William, so that he does not recognize the title of Joshua, and his heirs cannot be concluded by the act of a third person. The proof shows the greatest intimacy to have existed between Joshua and William—the latter to have reposed the fullest confidence in the former; the active interference of Joshua in the management of his brother's business; and the inconsiderable value of real estate in Mobile, previous to 1824. These circumstances incline us to think that the deeds were made by Joshua, in virtue of the general authority, which William yielded to Joshua over his property. We are then, constrained to conclude, that the purchases made by William E. Kennedy from Price, were not only conveyed to him individually, but for his own account and benefit.

This brings us to an examination of the deed of December, 1824. The question in regard to that deed is, was it made upon the consideration it imports, or upon some secret trust, that the land conveyed should be disposed of, for the benefit of William or his heirs.

The testimony of both Sefroy and Louis Dolive is exceedingly direct and explicit. These witnesses being nearly connected with Wm. E. Kennedy, and feeling as they must, the deepest interest in the welfare of his children, it was natural,

that they should have been advised of any disposition made by him of his estate. It was quite as natural, that Joshua always a devoted brother, should have been equally desirous of seeing the children of Wm. provided for, from their father's estate. Circumstances had then recently arisen, and were still increasing, to awaken the solicitude of relations. Wm. quite advanced in life, abandons as a means of livelihood, the practice of medicine, which he had hitherto pursued—the home at which he had lived with his wife and children, was broken up—in short, he almost loses his individuality in society, and abandons himself to habits of intemperance. In this condition of affairs, his fortune is likely to become a wreck; when his two brothers, brother-in-law, and other friends, consult together, with the view of devising means to save his estate for his family. Joshua is made the organ of communicating to Wm. the result of their deliberations. Wm. follows their advice, and executes the deed of December, '24, for the benefit of his children. Joshua admits that Wm's. property has been secured to his children, and that they will be wealthy. Such, in substance, is the evidence of the Dolives'. The testimony of Samuel H. Garrow, Daniel Robertson, Cyrus Sibley, Chester Root, Joseph Krebbs, John Shelton, Gorham Davenport, and Thaddeus Sanford, are strongly confirmatory of the Dolives', and relate facts utterly incompatible with the idea, that in receiving the deed of '24, Joshua Kennedy occupied any other position than that of a mere representative of William's children.

The testimony of a witness, who speaks positively to a fact is entitled to more consideration than several witnesses, whose statements are merely negative. Of the former character, is the evidence of the Dolives', and most of the witnesses who sustain them,—while the greater number of those who testify in opposition to them, merely state, that they were well acquainted with William and Joshua Kennedy—never heard them say that the deed of '24 was intended to secure the property conveyed to the children of the former; that had such been their intention, they believe they would have heard it. Such evidence is too loose and inconclusive to overturn the positive declarations of respectable witnesses.

But it is argued for the plaintiffs, that the health of Joshua was so bad at the time the deed bears date, as utterly to forbid the idea, that Wm. had conveyed to him in trust for his children. That Joshua Kennedy was in delicate health both previous and subsequent to 1824, we think, is apparent from the proof; but that there was about that time a rapid decline, which seemed to forbode an early death, is hardly probable. True, some of the witnesses suppose, that there were symptoms of the rapid approach of a pulmonary disease; while others equally well acquainted with him, discovered no material change. Again, some of the witnesses suppose, that the object of his visit to Havanna, was the improvement of his health; while some suppose, that the end proposed was twofold, viz: the restoration of health, and the examination of Spanish archives touching land titles at Mobile; and others believe that the sole object was the examination of land titles.

That Joshua's health was bad, cannot be questioned, but that it was such to induce an anticipation of a speedy dissolution, on the part of his brother and family, is what we cannot believe. The vessel on which he went out, and others leaving about the same time, carried for him eighty thousand feet of lumber, for the Havanna market; yet there accompanied him no member of his family, agent, or servant, to dispose of his lumber, or to attend him in his affliction. That Joshua Kennedy's means well enabled him to bear the increased expense of an agent or servant, cannot be doubted; that the affection which his family and brothers cherished for him, should not have prompted some one of them to accompany him, if his health was so desperate as is now represented, is indeed unaccountable.

It was quite natural after the deed of 1824 was executed, for Wm. to refer persons desiring to purchase to Joshua; the object of that deed was to divest himself of all title, and to provide for his children. Louis Dolive explicitly states that he was informed by Joshua, that Wm. had conveyed to him all his property by a deed of trust; that he had the entire management of it, and the children would have plenty of land. Many of the witnesses testify as to the great influence of Joshua over Wm.—some say he leaned on Joshua—others say Joshua

seemed necessary to his support—one says that he had as much influence over him as a father over his child; and many concur that Joshua had the entire management and control of William's property. Considering then, the confidence which William reposed in Joshua; the uncertainty and comparatively small value of his title to the Price tracts; the knowledge which Joshua possessed of Spanish titles, it is not at all surprising that William should have invested him with his right, upon an assurance that he would endeavor to consummate the title, or otherwise dispose of the property for his children. Upon the consultation between Joshua, Joseph and the Dolive's we are informed that it was thought best that William should convey to Joshua. This shows that William's friends considered such a measure proper and likely to meet his approbation, or they never would have advised it. Joshua, in repeated conversations, not merely casual or accidental, but sometimes with friends, with whom he most probably communed freely, spoke of the conveyance from William to him, for the children of the former. The credibility of none of these witnesses has been assailed, and the majority of them, so far as the record informs us, are not connected with either party. The repeated declarations of Joshua, together with the circumstances we have related, all tend to show, that the deed to him was not made upon the ground of a purchase, but was intended as a means of securing to the children the property of their father.

But is argued for the plaintiff's in error, that the declarations of Wm. E. Kennedy show that Joshua paid him an adequate pecuniary consideration for his interest in the Price tracts, at the time the deed was executed, or that the conveyance was induced by the extinguishment of claims which Joshua had against him.

Several of the witnesses examined by the plaintiff's in error, speak of admissions by William after December, '24, that a settlement had been made between Joshua and himself. Mr Kitchens, the elder, states, that he was in Mobile after the departure of Joshua for Havanna, when a report reached there, that he had died on the outward passage; upon which occasion he had a conversation with William, who told the witness that a settlement had been made between himself and his

brother. William seemed pleased that he had settled with his brother; inasmuch (as he said) there could be no controversy between himself and Joshua's children, should the rumour of their father's death be true.

Mr. Lane testifies that in the latter part of 1824, he met with Wm. E. Kennedy, who told him, that he had come across the bay (to Mobile we suppose) to settle with Joshua—that he had effected a settlement with him; and that any of his lands he might desire, he could purchase of Joshua, whose title would be good.

De Large states that in the latter part of '24 or early in '25, he applied to William to purchase a piece of land, who told him he had sold all to Joshua, and had nothing to do with it, but would go with him to Joshua and ask him to sell witness the land. They looked for, but could not find him.

It is difficult to reconcile the testimony of Kitchens, with the repeated declarations of William and Joshua, previously and subsequently made to other persons, upon any other supposition, than that a writing was executed declaring the terms on which the deed was made. But let it be conceded, that the declaration was made by William in the terms in which the witness has stated, and yet, it cannot be allowed to outweigh the statements, both of himself and Joshua often made as to the inducement to and purposes to be effected by the deed of 1824.

In respect to Lane's testimony, instead of opposing the idea of a secret trust for William's children, it is entirely consistent with it. The testimony of the Dolive's show a settlement by the conveyance to Joshua; and other witnesses show, that Joshua was in the habit of selling parts of the Price tracts, and that William recognized his right to sell—but for the benefit of the children doubtless. Now, as to the testimony of De Large, it can exert no influence against the declarations of Joshua, and other witnesses which serve to explain and direct its meaning. It is clear that William did not after December, '24, undertake to sell any part of the land conveyed to Joshua. Such an act on his part would have been incompatible with the purposes of his deed. As to the expression that he, William had "sold" to Joshua, if in itself entitled to any force, it is sufficiently shewn by the evidence of the Dolive's and oth-

ers, what was meant by it. But we should think, that at this distance of time, the witness would not undertake to say, that William in the conversation referred to, did not use the term "transfer" "assign" or some other of equivalent import in common parlance.

It is further argued for the plaintiffs, that the deed of 1824, is sustained by the consideration expressed on its face ; that in 1797, Wm. E. Kennedy was prosecuted, tried and acquitted in South Carolina, for the murder of Colonel Maxwell ; that the expenses consequent upon that prosecution amounted to near ten thousand dollars, and were paid by Maxfield Kennedy his brother ; and that upon a settlement at Mobile in 1820, between William and Maxfield, Joshua undertook to pay the latter, between nine and ten thousand dollars (sixteen hundred of which has been paid.) In consideration of Joshua's promise, William was to convey to him real estate in Mobile. These facts are all related in a deposition of Maxfield.

Waddy Thompson, sen'r. who (though it is not shewn by the record) has been a distinguished lawyer of South Carolina, states, that he was present at the Court, when Wm. E. Kennedy was tried for the murder of Col. Maxwell ; and that the expenses of his defence could not have exceeded *five hundred dollars*. *And further*, that he knew Maxfield Kennedy, and that he could not have paid either in cash, or with his credit the one-hundredth part of the sum that he says Joshua assumed for William.

Mr. Aikin had a conversation with Joshua Kennedy in 1836, in which the latter spoke of his advance to Maxfield, not as the payment of a debt, but as the witness understood, solicited by Maxfield and given by Joshua as a mere gratuity.

Several witnesses, who testify to Maxfield's condition as to property at this time and many years back, represent him as never having had much, and for many years very poor.

We will not undertake to say, that Maxfield Kennedy's testimony is not literally true ; but opposed as it is by other witnesses, whom it is presumable are quite as free from bias as himself, it defies all credence.

Can it be believed, that if Joshua had been the debtor of Maxfield, and the kind and affectionate brother, which Maxfield and others represent him to have been, that he would not

long since have paid him to the uttermost farthing. Joshua was wealthy, while Maxfield, since his residence in this State (which perhaps exceeds twenty years,) has never, says a witness well acquainted with his situation, had more property at one time than would pay his debts—he was always straitened with a large family to support. If Joshua owed him nothing, an extended benevolence would have prompted him to do quite as much as he did.

In conversations of Joshua Kennedy, which are related by the different witnesses, he never intimated that he had purchased the Price tracts, or that they had been conveyed to him in consideration of his engagement to pay Maxfield a demand against Wm. E. Kennedy. But he insists that he had obtained the grants for Price, and purchased them from him; and that William was made a mere depository of the title, because he was a Spanish subject. This pretension, instead of being sustained by evidence, we have seen is entirely disproved.

The idea that Joshua Kennedy should have paid the consideration expressed in the deed, is incredible in the extreme. Wm. E. Kennedy was a man of frugal habits; cultivated a small farm, and was a popular practitioner of medicine, especially among the native population; he also received with his wife several slaves, and from her father's executor at one time more than two thousand dollars. These sources of income, together with the large amount of money he must have received from the sale of portions of his land, doubtless furnished him a competency for the support of his family.

So far from William being the debtor of Joshua, the reverse would rather seem to be true. Several deeds accompanying the record show, that Joshua between 1818 and 1824, sold parts of the Price tracts, allotted on Matthews map to William, for considerations expressed in the deeds, amounting to more than five thousand dollars.

Without extending this argument, we think it may be said, that it has been sufficiently shewn, that Joshua paid no consideration for the deed of 1824, but received it upon a promise, that the land conveyed should be held or disposed of for the benefit of the heirs of Wm. E. Kennedy.

We here close the view, which we have felt it our duty to take of this very interesting and important cause, with some

general remarks. As we are of opinion, that the facts establish a fraud in obtaining the deed of December, 1824, or in perverting it to a purpose in opposition to the agreement between the grantor and grantee, and that it should consequently be set aside; the doctrine of trusts, or rather the manner in which they shall be declared need not be examined.

The failure of the proof to show with exactness, the terms on which the conveyance was made and received, can interpose no objection to setting it aside, though it may render it impossible to execute entirely the intentions of the grantor. If the law were otherwise, the grantee and his heirs might have acquired an indefeasible estate, without having paid any equivalent therefor. The objection then, that the parol stipulation in regard to the property conveyed, does not appear, has no foundation in moral justice; the more especially, as it was entirely competent for the plaintiffs in error, to have shewn every term which they esteemed beneficial to themselves.

Upon setting aside the deed, the rights of both parties must be protected. If Joshua Kennedy expended money, in order to perfect a title to the Price grants or other part of the land conveyed, these expenditures so far as they were necessary or proper must be reimbursed with interest, together with a just compensation for his time, &c.

So if in the settlement of his guardianship accounts, his liberality in providing for the maintenance of his wards without charge, was not intended as a mere boon, but was induced in consideration of the deed of 1824; that deed being set aside, his executors will be allowed to exhibit a proper charge against the defendants in error.

Though there is nothing in the record to cause us to doubt, that the deed in question was made upon a secret trust, for the benefit of the complainants, yet we desire in nothing we have said, to reflect upon the memory of Joshua Kennedy. It is an ignoble and disingenuous spirit which prompts one to speak unkindly even of the living, and it is much more reprehensible to indulge terms of harshness of the dead. Joshua Kennedy in common with other men had his faults, and may have been the victim of temptation; but he has left behind him the remembrance of some noble traits of character; he

was industrious, temperate, energetic, persevering and affectionate to his relatives. These are virtues which stand out in bold relief and cover a multitude of faults.

Without extending this opinion to greater length, by a recapitulation of the points decided, we have only to say, that the decree of the Court of Chancery is affirmed.

After the delivery of the foregoing opinion, GEO. N. STEWART, one of the counsel for the plaintiffs in error, presented to the Court a petition for a re-hearing; in support of which he cited the following authorities *Gresley's Eq. Ev.* 401, 123; 3 *Swanton's Rep.* 344; 1 *Tamlyn's Rep.* 63; 2 *Sim. & Stu. Rep.* 301; 16 *Ves. Rep.* 156; 2 *Bro. Ch. Rep.* 345; 9 *Ves. Rep.* 168; 2 *Ves. Rep.* 486; 1 *Merivaille's Rep.* 308; 3 *Bro. Ch. Rep.* 228; 1 *Eden's Ch. Rep.* 256; 1 *Bro. Par. cases* 140; *ibid* 134; *ibid* 426; 6 *ibid* 364; 1 *Ball. & B. Rep.* 548; 2 *ibid* 387; 3 *Merivaille's Rep.* 466; 4 *Ves. Rep.* 769; 6 *Ves. Rep.* 671; 13 *ibid* 95; 1 *Russell's Rep.* 301; 2 *Paige's Rep.* 482; 1 *Hopkin's Rep.* 436; 2 *Munford's Rep.* 412; 4 *ibid* 450; *Gilmer's Rep.* 211; 1 *Rand. Rep.* 249; 2 *ibid* 109; 2 *Brock. Rep.* 256; 1 *ibid* 266; 1 *Dana's Rep.* 93; 4 *Call's Rep.* 416; 6 *Munford Rep.* 245, 385, 459, 464; 6 *H. & Johns. Rep.* 24; 1 *Bro. Ch. Rep.* 92; 1 *Porter's Rep.* 349; 1 *Gall. Rep.* 170; 5 *Johns. Ch. Rep.* 1; 5 *Ohio Rep.* 255; 2 *Ves. Rep.* 196; 6 *Ves. Rep.* 327, 333, 4; 1 *Ves. Rep.* 317; 1 *Bro. Ch. Rep.* 241; 1 *Johns. Ch. Rep.* 252; 4 *Rand. Rep.* 54; 11 *Vermont Rep.* 138; *Gresley's Eq. Ev.* 205; 1 *Johns. Ch. Rep.* 598; 2 *ibid* 412; 6 *ibid* 19; 10 *Ves. Rep.* 517; 6 *Wend. Rep.* 277; *Aik. Dig.* 2 proviso to 11 sec. p. 287; 2 *Stewart's Rep.* 214; 8 *Dana's Rep.* 212; 7 *Gill & Johns. Rep.* 193; 9 *ibid* 97; 6 *Johns. Rep.* 222; 5 *Cow. Rep.* 714; 4 *Munford's Rep.* 450; 2 *Rand. Rep.* 109; *Pamp. Acts of 1840*, p. 46; 2 *Fonblanque's Eq* 720; 2 *Ball. & B. Rep.* 444; 1 *P. Wm. Rep.* 734; *ibid* 504; 2 *ibid* 403, note; 2 *Atk. Rep.* 487, 532; 2 *S. & P. Rep.* 427.

KENNEDY'S HEIRS AND EXECUTORS v. KENNEDY'S HEIRS.

COLLIER, C. J.—The elaborate argument of this cause at the last term, and the full consideration given by the Court to the points made, had induced us to hope, that our opinion, however unsatisfactory, would be acquiesced in. But in this expectation we have been disappointed. The plaintiffs have presented to us a petition for a rehearing, in which is embodied a long and ingenious argument. The grounds on which the cause is asked to be reheard, are *First*—This Court is supposed to have erred in its view of the law of the case. *Second*—The decree of the Chancellor should have been reversed, because he decided the question of fact arising upon the proofs, instead of directing an issue to be tried by a jury. *Third*—The decree directs a conveyance to be made by the executors of Joshua Kennedy of the lands which Wm. E. Kennedy conveyed to their testator, though Joshua Kennedy acquired a portion of these lands by an independent and paramount title. *Fourth*—The decree is erroneous because it prescribes no day when the heirs of Joshua Kennedy shall show cause against the same, after attaining their majority.

First—We are entirely satisfied with the opinion that has been delivered. It rests upon authorities too numerous, and reasoning too cogent to induce us to doubt for a moment its entire correctness. The judges who lived nearest the period of the enactment of the English statute of frauds declared, that *it was intended to prevent and not to cover and protect frauds*; and their successors following in their footsteps, have often reiterated the same declaration. And such at the present day is the current of decision, both in England and the United States. We will not undertake to affirm that there are no opposing *dicta* or adjudications, but certainly there are none to unsettle or disturb the general course of decision.

But it is insisted that the admission of evidence to show, that Wm. E. Kennedy was induced by the promises of Joshua (which have never been performed) to execute the deed of

December, 1824, or that Joshua had made a fraudulent use of that deed, would be to deny the authority of the statute, and equivalent in point of fact to its repeal. This argument upon its first presentation is specious, but really it has nothing of solidity. It is a cardinal rule in the construction of statutes, so to interpret them, that the intention of the law-maker may be carried into effect, and the spirit of the enactment preserved. Under the influence of this rule, the letter is frequently sacrificed to the general purposes and intention of the act. Although the admission of parol proof in opposition to the deed, would not according to a literal interpretation of the statute be allowable, yet its exclusion would oppose the spirit and intention of the law, which is the suppression of fraud; and it is on this ground that such evidence is admitted, consistently with the operation of the statute.

The legislature which enacted our statute of frauds, must be presumed to have been cognizant of the construction placed upon the English statute, and in adopting substantially the terms of that enactment, impliedly approved the judicial interpretation it had received. Such is the conclusion which reason would suggest, and it becomes doubly fortified by the consideration, that the legislature have employed no terms to countervail the effect of decisions made upon the English and American statutes of similar import.

With great deference we think the correctness of these views, and their application to the case before us would be obvious to the learned counsel for the plaintiffs, if they would reflect for a moment, that the jurisdiction exercised by a Court of equity, is more extensive than that, which is claimed for a Court of law, in cases of fraud. While the former may prevent the fraudulent use of a deed, or if obtained upon promises which have been falsified, may set it aside entirely, the latter only relieves where there is *fraud in its execution*.

Second—It may be regarded as a settled practice of equity, to direct *an issue at law*, where a question arises upon the validity of a will, and it would be irregular for the Court to render a decree against the heir until the invalidity of the devise had been found by a jury. 2 Har. Ch. prac. 126; 2 Bla. Com. 452; 1 Hoffin Ch. Prac. 502; 2 Story's Eq. 672; Pemberton v. Pemberton, 11 Ves. Rep. 52; Bootte v. Blundell, 19

Ves. Rep. 501; 1 Eq. Ca. Ab. 133. Blackstone in treating of the proceedings in equity says, "If matter of fact is strongly controverted this Court is so sensible of the deficiency of trial by written depositions, that it will not bind the parties thereby, but usually directs the matters to be tried by a jury; especially such important facts as the validity of a will, or whether A. is the heir at law to B. or the existence of a *modus decimandi*, or a real and immemorial composition for tithes." See also 2 Story's Eq; 696-7. But if the plaintiff's right is so clearly made out, as not to be doubtful upon the testimony what should be the verdict of a jury, the Court will render its decree without directing an issue: for the Court is not bound to refer to a jury every disputed fact. [Simmons v. Tillery, 1 Tenn. Rep. 274; Newman v. Milner, 2 Ves. Rep. 483.] The object of an issue is to satisfy the mind of the chancellor upon matters of fact, but if his conscience is satisfied without the aid of a verdict, it is competent for him to render a decree. [Mullock v. Mullock, 1 Edwd. Ch. Rep. 14; Apthorp v. Comstock, 2 Paige's Rep. 482; Rice v. Griffin, 1 Molloy Rep. 401.]

Lord Eldon said, there was no doubt but a Court of Chancery might take to itself the decision of every fact put in issue upon the record; and that anciently Courts of equity were more in the habit of deciding questions of fact than they have thought wise and discreet in later times, "as to the immemorial payment of tithes, if any reasonable doubt has been raised upon it in the evidence, it has been of late thought wise and discreet to send the question of fact to a jury. All the judges have demonstrated their opinion in favor of the practice, where any reasonable doubt is raised upon the facts." [O'Connor v. Cook, 6 Ves. Rep. 671; 8 Ves. Rep. 526; See also Blackburn v. Jepson, 17 Ves. Rep. 479; The Wardens of St. Pauls v. Morris, 9 Ves. Rep. 164.]

In Bree v. Beck, 1 Young's Rep. 243, the question was as to a *modus* and an issue was directed to try it. Baron Vaughan observed, "this is an issue directed by my Lord Chief Baron for the purpose of satisfying his conscience, and with a view to assist him in administering that relief in equity to which the parties may appear to be entitled. I take it to be clear, that it was competent to my Lord Chief Baron, if he had been so disposed, to have assumed to himself the deter-

mination of every matter of fact suggested by this record." So in *Fornhill v. Murray*, 1 Bland's Rep. 485, it was said not to be indispensably necessary, that a Court of equity should direct an issue for the trial of a question of fact; and that it is only resorted to, where the weight of evidence can be better estimated by a jury. And in *Apthorp v. Comstock*, 2 Paige's Rep. 484, the chancellor remarked "although this Court (Chancery) in the exercise of a sound discretion, has a right to decide every matter of fact, which comes before it, without the intervention of a jury, yet there are some cases in which important rights, depending upon a mere question of fact, ought not to be decided without giving the defendant who has not come voluntarily into this Court, an opportunity to establish his claims before a jury." "It would be attended with infinite mischief" says Lord Redesdale "if Courts of equity were to hesitate in deciding on questions of fact, when sufficient evidence is before them." [*Whalley v. Whalley*, 3 Bligh's P. C. 16. And Chancellor Walworth remarks, that "issues should be directed only in those cases, where there is a want of evidence, or the testimony is contradictory and so nearly balanced, that it is necessary to have an open and rigid cross examination of the witnesses before the jury, who are to decide the question of fact upon their conflicting testimony." *And further*, where the primary Court had a right to decide the question of fact, without the intervention of a jury, the learned Chancellor was not prepared to say, that a party who did not ask for an issue could sustain an appeal, unless he is able to satisfy the appellate Court, that the decision was wrong upon the question of fact. [*Townsend v. Graves* 3 Paige's Rep. 453.]

In *Nice v. Purcell*, 1 Hen. & Munf. Rep. 372, it was decided, that a Court of equity was not bound to direct an issue, on the ground that the evidence before it is contradictory; but may judge of the weight of evidence, and if the conscience of the Court be satisfied, render a verdict without the aid of a jury. See also *Rowton v. Rowton*, *ibid* 92. And in *Baltzell v. Hall's heirs* 1 Litt. Rep. 98, the Court say "whatever ought to be the mode of liquidating uncertain sums in cases where the legislature has transferred to the Chancellor jurisdiction of controversies strictly legal, we have no doubt that in all cases

purely equitable, the Chancellor may ascertain and fix, without resorting to a jury or commissioners, all uncertain sums to be adjusted between the parties, as was decided by this Court in *Head's heirs v. Head's Adm'rs.* 4 Marshall's Rep.

We have examined with attention the citations made by the plaintiff's counsel to this point, and find that with few exceptions, they are in harmony with the cases we have noticed. True in *Harrington et al. v. Horton*, 1 Bro. Par. cases 140, the House of Lords reversed a decree of the Lord Chancellor, and directed an issue without pointing out any other objection to the dismissal of the bill, and although the Court of Chancery was not asked to send an issue to be tried by a jury. But in that case, the question was as to a *modus*, which may perhaps be considered as one of the excepted cases, in which an issue is indispensable.

In *Knibbs v. Dixon's ex'r.*, 1 Rand. Rep. 249, the question was, whether an absolute bill of sale was intended only as a security. The evidence being contradictory, the Chancellor dismissed the bill at the hearing. On appeal, the decree was reversed, because the evidence should have been submitted to a jury on an issue made up between the parties. And *Douglass v. McChesney*, 2 Rand. Rep. 109, it was held, where it was doubtful upon the testimony whether the purchase of a horse by the complainant of the defendant, was made upon a real *bona fide* sale, or as a mere shift to evade the statute against usury, an issue should be directed to try the fact. For the failure thus to proceed, the decree of the Court of Chancery was reversed on appeal. The opinions in these cases are very brief, and do not inform us on what grounds they rest; but as they are sustained by no other decisions of which we are aware, unless it be some adjudications in Kentucky, which we have not seen, we suppose they are founded on a statute. In 1818, an act was passed by the Legislature of Virginia for the re-organization of the Chancery Courts, which contains a section in these words: "The said Courts in their discretion may direct an issue to be tried, whenever it shall be judged necessary, either in those Courts, or any other Courts whatever, as justice or convenience to the parties may require: and in all other cases, the mode of trial shall be the same as hath been heretofore used and practised in the Courts of Chancery

of Virginia." (1 vol. Rev'd. Code of 1819.) Now we are inclined to think, that this enactment must have influenced the decision of the cases cited; the more especially as they overrule the case of *Nice v. Purcell*, which was decided previous to its passage.

In Kentucky, the Legislature have made some provision in regard to the directing of issues; but to what extent the practice in that State is controlled by a statute, we are unprepared to say.

But even conceding to the later Virginia cases the force of authority here, and we think they do not sustain the argument for the plaintiffs. The weight of evidence so strongly preponderates in favor of the complainants, as not to require the verdict of a jury to inform the conscience of the Court. There is no irreconcilable conflict in the testimony, except as it respects two of the witnesses of the plaintiffs in error, and these are entirely outweighed by the complainants' evidence.

The question now presented to us is, not whether the Chancellor would wisely have exercised his discretion in directing an issue, but whether he has invaded the prerogative of the jury by deciding for himself the questions of fact. To maintain the affirmative, would be to determine, that every controverted fact in a suit in equity, must be referred to a jury. For such a proposition the plaintiffs' counsel would not directly contend. Its establishment would overturn some of the oldest rules of practice in equity, and unsettle to a great extent the course of proceeding there.

The principal matter in controversy in the case before us, is *exclusively* cognizable in equity, and according to the cases cited from Kentucky, might be determined by the Chancellor without the intervention of a jury, no matter how contradictory the evidence.

We will not undertake to say that an appellate Court may not reverse a decree on the ground that an issue was not directed, where it appears the facts were so much disputed, as to render it impossible by an application of the ordinary tests to explicate them. In such a case, a *viva voce* examination of witnesses before a jury, it seems to us would be all important. But in the present case, the facts are not thus involved, and the Chancellor properly decided them without the aid of a ju-

ry; the more especially as an issue was not asked. And such was the view taken by the plaintiffs' counsel at the argument; for it was not then pretended, that an issue should have been directed; but it was argued, that the Chancellor had erred in his conclusion both upon the law and the facts.

The counsel for the plaintiffs also insists, that it is important to the moral influence of Courts, that they should command the highest respect and reverence, and that the Judges should not provoke heart burnings and dislike; but their proceedings should be so directed as to bring satisfaction and content to the parties. That as the decision of the facts in the present case involve a high degree of responsibility, and will in all probability produce great dissatisfaction on the part of the unsuccessful party, this Court should impose that duty on a jury whose number and organization would relieve them from serious complaint, and whose means of ascertaining the truth by a *viva voce* examination of witnesses as far as practicable, would satisfy all parties. The character of the learned counsel who addressed to us this argument, is such as to assure us that it was made in seriousness, and it demands from us a respectful answer.

We are certainly not indifferent to the voice of public approbation, but the monitions of the "still small voice of conscience," address us in louder and more commanding tones, and we cannot hesitate to yield to it a paramount obedience. It is not only the duty of a Court to decide correctly, but in such a manner as to give general satisfaction, if it be practicable. But the first duty is correctness of decision; and this is not to be lost sight of, however unpopular it may be. Courts do not possess the power to make or modify the law at pleasure—this is the office of the legislator. Judges can only declare the law as they find it. The Court of Chancery, we have shewn, did not err in adjudging the facts of the cause; and this Court cannot, without overstepping the utmost verge of its legitimate powers, hesitate to examine the decree of the Chancellor both upon the law and the facts.

We have always supposed that a high moral and official responsibility rested upon us for all our decisions here; but we are not aware, that in any instance our moral courage has faltered; and we are quite sure that we have never stopped to

calculate consequences to ourselves personally. When we shall find that we are wanting in nerve to follow the dictates of duty, we trust that there will be enough of patriotism and self-respect left, to induce us to throw from us the ermine ere it become tarnished. But we must stop this course of remark—what we have said, seemed to us to be called for by the argument we have noticed.

Third—The answer in this cause does not set up a title to any part of the lands conveyed by the deed of December, 1824, as distinct from, and independent of, the deed itself; and we cannot consequently know, that Joshua Kennedy acquired a part of these lands by the purchase of a superior and paramount title. But the plaintiffs in error cannot, if such be the fact, be prejudiced by the decree of the Chancellor. The decree merely sets aside the deed from William to Joshua Kennedy, and directs a conveyance to be made of the lands embraced by it, to the complainants. The terms of this conveyance are to be settled by the Master under the supervision of the Chancellor; and it will not, of course, be so framed as to require the executors of Joshua to convey any other estate than was received from Wm. E. Kennedy and confirmed by the United States; unless it be a quit claim or other confirmatory conveyance operating upon it. If the title conveyed by William to Joshua was legally defeated by the judgment of a Court by one independent of, and superior to, it, and Joshua acquired this latter title, the rights of the parties to the property thus situated, must be adjusted in some future controversy; unless it shall be found practicable to raise the question on exceptions to the Master's report.

Fourth—In respect of the objection that the decree prescribes no time when the infants, against whom it is rendered, may impeach it, after attaining their majority, it is enough to say, that the statute ascertains the time; and, therefore, it need not be repeated in the decree. [Cato v. Easley, 2 Stewart's Rep. 214.]

The immense value of the property involved in the decision of this cause, and the interest it has consequently excited, has induced us, contrary to our usual practice, to furnish an answer in writing to the petition of the plaintiffs. And it remains but to add, that a re-hearing is denied.

Judge GOLDTHWAITE not sitting.

CAMP v. CAMP.

1. Where C., about to sell a tract of land, represented to the proposed purchaser, that an open unmarked line would run in such a direction, as to include a field of forty acres of rich bottom land on an adjoining tract, when he had been previously informed by the owner of the land, that he had made an experimental survey, and found that the line would run so as not to include the field, as part of the land of C.; which, upon a survey, was found to be the fact,—held, that this was such a fraudulent representation of a material fact, as would authorize a Court of Chancery to rescind the contract.

Error to the Chancery Court at Talladega.

THIS bill is filed by Larkin Camp, and seeks the rescission of a contract, for the purchase of a half section of land. The complainant alleges, that he is a cousin of the defendant, and being desirous to settle himself on such a tract, as had sufficient good land for his means, he called on the defendant to aid him in purchasing. The defendant offered to sell him the tract, which he afterwards purchased, and complainant desiring to examine the land, it was shown to him by the defendant. One of the lines was not marked by the surveyor, more than one-third of the distance, or at least, the marks could not be found. On that side, the tract was bounded by land owned by Colonel McElderry, who had cleared a piece of good land, thirty-five or forty acres of which, the defendant represented to be on the tract he was then offering to sell, showing the complainant where the line would cross the fence. This land, the complainant alleges, was rich and fertile bottom land, and worth every other acre proposed to be sold; that in the confidence that these representations were true he purchased the land; that he has since discovered that but a very small portion of the land in McElderry's field belongs to the tract purchased by him, and that the defendant knew this fact when he made the representation, and sold the land; that before he made this discovery he had paid the defendant a negro woman, valued at seven hundred and fifty dollars, the whole amount of the purchase being fifteen hundred dollars, and that as soon as he discovered the

fraud practised on him, he offered to rescind the contract. The prayer of the bill is, that for the fraud in the sale of the land, the contract be rescinded; that the defendant be required to deliver up the negro woman, or her value with interest &c.; and that his notes be delivered up and cancelled.

The answer denies that there was any fraud in the sale of the land; that the complainant examined the land, and traced the open line so far as it could be traced by the surveyor's marks, and that the corner trees were shown to complainant. He denies that complainant purchased on the faith of his representations, but that all the facts to enable him to form his judgment were equally within his knowledge, as that of defendant. He admits that he did show complainant where he supposed the line would cross McElderry's field, and that he stated, that McElderry had forty acres of his land within his inclosure, but denies that he stated that there were forty acres within the tract he sold to Camp. He insists, that his representations were matter of opinion, of the correctness of which the complainant had the same means of judging that he had.

The evidence shows very clearly, that the defendant did point out to the complainant where the line would cross McElderry's field, and that he stated that forty acres of the field would belong to the tract he was offering to sell to Camp, and that this is rich bottom land, valued by a witness at twenty dollars per acre.

Col. McElderry testified that the line spoken of, was a range line, that it had been marked by the surveyor only one-third of the distance, which was a half mile; that he had himself run out the line with a pocket compass, and found that the field was principally on his land, and so informed the defendant previous to the sale to complainant; that the line has since been run by the county surveyor, by which it was ascertained that not more than from a half an acre to an acre of land of his field was included in the land sold to Camp. On his cross examination in answer to a question by defendant, whether the line thus run was established as the true line, he answered it was not.

Upon the hearing, his honor the Chancellor dismissed the bill, from which this writ of error is prosecuted.

CHILTON, for the defendant in error.

ORMOND, J.—The bill prays a rescission of the contract, on the ground, that it was obtained by the fraudulent representations of the defendant. The facts are, that the complainant being about to purchase land of the defendant, made an examination of it with him for the purpose of ascertaining whether it contained a sufficient quantity of valuable land to suit him. On one of the boundary lines of the tract, half a mile in length, no marks of the surveyor could be discovered but one third of the distance from one of the corners. That portion of the line not marked, was bounded by the lands of Colonel McElderry, who had cleared a field of rich bottom land, forty acres of which the defendant represented to the complainant to be part of the land he was then offering to sell; pointed out where the line would cross the fence, and designated the course of the line through the field, by a reference to standing trees. It is now ascertained, that not more than one acre of this land belongs to the tract sold by defendant to complainant.

The defence set up by the answer and by the argument of counsel is, that the representations were matter of opinion merely. The proof is conclusive to show, that the representations were made, and that the defendant, before the sale, had information that the line did not run as he represented it.

An examination of the case has satisfied us that the contract was obtained by the representations of the defendant of material facts, which he must have known at the time to be untrue, and also that he concealed material facts within his knowledge, which fair dealing required that he should have disclosed.

The complainant was a stranger in the neighborhood, and had never seen the lands before. The defendant, who was the owner, was well acquainted with it. It would naturally be an object of interest with him to know how the lines of his tract ran in reference to this piece of valuable bottom land, which, if included within his tract would greatly increase its value; and accordingly we find, that it had been the subject of conversation between him and the adjoining proprietor, who had the same interest; and that the latter had informed him that if the marks of

the line which could be found were correct, that the land belonged to him, as he had run it out himself with a pocket compass. Yet with this information of where the line did run, we find him not only concealing it from the complainant, but undertaking to point out precisely where the line would run thro' the field, designating the point where it would cross the fence, and its course through the field by a reference to sensible objects upon or near the supposed line.

It is certainly true, that the course of the unmarked line, to one who had no other guide than the extreme points, would be matter of opinion or conjecture. Is the conduct of the defendant explicable on this hypothesis? It has already been remarked that as the owner of the land, he must have felt considerable interest in ascertaining this fact; when this is considered in connexion with the manner in which the information was given, the designation of the precise spot where the line would enter the field; the indication of its precise course through the field, the quantity of fine land which would be thus added to a tract, which appears to be quite sterile, there can be but little doubt of the *quo animo*. But when to this is added the startling fact, that he was informed by one who had run the line, that it was different from his representations of it, but little doubt can exist that the intention was to deceive. The principles of justice and fair dealing, demanded of him a disclosure, that though such was his opinion, (if in fact he entertained it,) that the line had been run out by another, and that by his survey the field was excluded. Had he done so, there can be no doubt that the purchaser would have insisted on a survey of the land, to ascertain its true boundary. It is impossible not to see in the whole conduct of the defendant a studied attempt to deceive, not only by the assertion of a fact, which he either knew nothing about, or knew to be untrue, but also, by the concealment of a fact, which if disclosed, would have deprived his assertions of any claim to belief.

It is contended, that the law will not assist a purchaser, who does not enquire and examine for himself, but supinely rests on the opinions of those with whom he is dealing. The true meaning of this rule is, that the purchaser must judge for himself, as to all those matters which lie in opinion merely; as for

example, as to the value or quantity of the article he is about to purchase; assertions upon these matters, by the vendor should pass for nothing; so also, if he should falsely attempt to bolster up his declarations by imaginary opinions of others, these are the common artifices or tricks of trade, which every one competent to make a contract, is, by law presumed able to guard against. Nor is the seller under any legal obligation to call the attention of the purchaser to those qualities of the article offered for sale, open to common observation, which depreciate its value, but he must not resort to any artifice to conceal them.

But the law is not so destitute of morality, as not to require each of the contracting parties to disclose to the other all material facts, of which he has knowledge, and of which he knows the other to be ignorant, unless they are open to common observation; and not to forbid any intentional concealment, or suppression of the material facts necessary to be known, and to which the other has not equal access, or means of ascertaining. [2 Kent's Com.; 1 Ed. 377, and cases cited in support of the text.]

It is true, the complainant might have refused his confidence to the representations of the defendant, and insisted on a survey to ascertain the boundary; but whilst the law exacts ordinary care and diligence on the part of the purchaser to ascertain the quality and quantity of the article he is about to purchase, and "does not go the romantic length of giving indemnity against the consequences of indolence or folly, or a careless indifference to the *ordinary* and *accessible* means of information," it does not exact *extraordinary* diligence, but as to those facts which, by ordinary diligence could not be ascertained, it permits a reliance on the assertions of the party, who from his opportunities, has the means of knowledge.

Thus at the last term, in the case of *Young v. Harris*, admr., this Court relieved a purchaser who was a stranger in the country, and relied on the assertion of the vendor, that he had title, when in fact, the land had been entered in the name of an infant son of the vendor, which could have been ascertained by application at the land office; and on the ground, that when there was no cause for distrust, such extreme diligence was not

required. So in this case the complainant might have insisted on a survey of the land, but we cannot think he was guilty of folly, or supine negligence in trusting to the positive declarations of one who, from his situation, might well be presumed to know the facts he undertook to state, and from his relationship, it might be supposed he would not voluntarily deceive.

It is supposed by his honor the Chancellor, that it is not yet satisfactorily established, that the cleared land, which is the subject of this controversy, is not a part of the land purchased. The line in dispute is a range line, and so far as the marks can be ascertained, it must be assumed to be correct. The unmarked part of this line according to the proof of Col. McElderly, has been surveyed by the county surveyor, and by the line thus run, the cleared field except about an acre is on his land; and until this survey is impeached, we presume it to be correct. What the witness meant by saying on the cross-examination, that the line thus run "was not established as the true line," we do not comprehend. The survey by a competent person, such as we must presume the county surveyor to be, would be sufficient proof of the situation of the disputed line to authorize either a Court or jury to act on it as a fact proved in the cause.

It could not, in a legal sense, "be established as the true line;" but by the finding of a jury in a suit to settle the boundary. It is probable that the witness meant that the survey was not recorded in the office of the county Court, as the statute requires. But it is certain, from the proof that a survey was made by a competent person, and the result of that survey, until impeached, is at least *prima facie* evidence.

It is not however important whether this fact is proved or not, as it is expressly alledged in the bill, that the cleared land, which was the subject of the representation made by the defendant at the time of the sale is not a part of the land purchased by the complainant, and this fact is *admitted* by the defendant; it was, therefore, not only unnecessary to prove it, but it could not be disproved.

The result of our examination, is, that the complainant is entitled to the relief he asks for, and that the Chancellor erred in dismissing the bill. The decree should have been, that the

contract be rescinded, and that the notes and title bond be cancelled. That the complainant recover the negro woman taken in part payment, if to be had, with legal interest on the sum she was estimated at, during her detention, or her value, as estimated by the parties. That an account be stated between the parties charging the complainant with the value of the occupation of the land if any, and the defendant with the value of all valuable and lasting improvement made there previous to his offer to rescind the contract.

Let the cause be remanded for further proceedings.

TARLETON & BULLARD v. GIBSON.

1. When a sheriff returns that an execution has been levied on certain slaves, but sold the same to satisfy an older execution in his hands at the same time, he is not liable to a motion for a false return if the facts, as stated by him in his return, are true, although a sum of money may remain in his hands unappropriated after satisfying the oldest execution.
2. *Quere*—Whether such a return will discharge the sheriff from liability, if proceeded against for making no return; and also, whether it is not his duty, after charging himself by a levy, to shew in his return every fact which is necessary to his complete discharge.

Writ of error to the Circuit Court of Talladega County.

MOTION against the defendant as sheriff of St. Clair, for a false return.

The motion to the sheriff sets out the execution, &c., on which was the following return: "Levied on four negroes, Eliza, Ellen, Mill and Sam, as the property of Solomon W. Dunn. The property levied on by this execution, was sold to satisfy an older execution which I had at the same time." This return was averred to be false.

An issue was formed, and submitted to a jury, who returned a verdict for the defendant, on which he had judgment.

A bill of exceptions was taken at the trial by the plaintiffs, which discloses, that the evidence before the jury shewed that the return, so far as it went, was true, that is, that the slaves levied on were sold by virtue of an older execution, which was in the sheriff's hands at the same time. But the evidence also proved, that the return did not set out all the facts attending the case—that is, the slaves sold for more than sufficient to pay the older execution and all incidental expenses, costs, &c., leaving in the hands of the defendant, one hundred and seventy-four dollars unappropriated, and which should have been applied to the plaintiff's execution. It was also in evidence, that after the slaves were sold, and before the return was made, the plaintiff's attorney requested the defendant to apply whatever money was to the execution, and to make the proper return; also, that the attorney demanded whatever sum of money was due on the execution, and when the sheriff refused to pay it, informed him he should rule him for the money and damages. The Court determined, that the defendant, under the circumstances in evidence, was not liable in this form of proceedings, as the notice did not inform him wherein his return was false, and for which he was sought to be made accountable; and instructed the jury, if they believed the return of the sheriff was true as far as it went, yet in this form of proceeding, and under this notice, they must find for the defendant, although the return omitted to set out some facts very material to the plaintiffs' interest.

STARR, for the plaintiffs in error.

MOODY, for the defendant.

GOLDTHWAITE, J.—1. The plaintiffs proceeded against the defendant for a false return merely, and could therefore recover, in the event that the proof sustained their allegation that the return was untrue. The Court very properly instructed the jury, that the omission of certain facts from the return did not falsify those which were stated.

2. It is very possible that, under a proper motion, the defendant might have been made liable; as it certainly deserves consideration whether the sheriff, after charging himself by a

levy, can exonerate himself in any other manner than by shewing on his return every fact necessary to his complete discharge. It is also questionable whether such a return as this, is entitled to be considered as a legal return, for the reason we have stated.

Let the judgment be affirmed.

HILL v. NORRIS.

1. The release of a debt, or unliquidated demand, is not proved by the certificate of a notary public under his notarial seal, certifying that the same was acknowledged by the party executing it: and the rule of the common law, which excludes such evidence, is not varied by the act of 1803, "concerning notaries public," unless perhaps it be shown that such an instrument is "commonly proved or acknowledged before notaries within the United States."

THIS was a proceeding by *scire facias* in the Circuit Court of Bibb, to revive a judgment which the defendant in error recovered against the plaintiff at the fall term of that Court, holden in 1832. The judgment was by confession, and contained a stipulation as follows: "The plaintiff doth agree that no execution shall issue on this judgment, until he shall file in the clerk's office a release signed by James Taylor, of all damages, by reason of his having accepted the bill of exchange which is the foundation of this suit."

The *scire facias* recites, that the defendant in error did, on the 29th day of August, 1837, file the release of Taylor, as contemplated by the judgment; alleges that the judgment is in full force and unsatisfied, save only as to the sum of four hundred dollars, which was paid in October, 1832; and calls upon the defendant below to show cause why execution should not issue on the judgment.

The defendant demurred to the *scire facias*; which being overruled, he pleaded several pleas; but the only one on which

a question of law was raised, is that which denies the making of the release by Taylor.

At the trial, the presiding Judge sealed a bill of exceptions at the instance of the defendant below, which sets out the release of Taylor, attested by a subscribing witness, with a certificate of a notary public attached, in the following words :

*“ The State of Alabama, Mobile county.—*Before me, John F. Everett, a notary public, duly commissioned and sworn, and dwelling in the city of Mobile, personally appeared James Taylor, and acknowledged that he had signed and sealed the foregoing release for the purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, at Mobile, the 28th day of November, A. D. 1832.

[Seal.] JNO. F. EVERETT, Notary Public.”

To the admission of the release in evidence without further proof, the defendant objected ; but his objection was overruled, and he thereupon excepted.

The defendant then offered three witnesses, who stated that they were acquainted with the hand-writing of James Taylor, and from their knowledge of his hand-writing, they did not believe the signature to the release to be his.

The Court charged the jury, that to avoid the release, “ the defendant must impeach the notary public as well as the signature of Taylor.” To which the defendant excepted, &c. And a verdict and judgment being rendered in favor of the plaintiff below, the defendant has prosecuted a writ of error to this Court.

J. L. MARTIN, for the plaintiff in error.

PECK, contra.

COLLIER, C. J.—There can be no question, but it was competent for the Clerk of the Circuit Court to determine in the first instance upon the genuineness of the release, and if satisfied that it was made by Taylor, issue an execution. But the certificate of a notary, or other public officer, would not be indispensable to enlighten his understanding—he might, had he thought proper, have acted upon his own knowledge of Tay-

lor's hand-writing, without proof; or he might have received as sufficient, the representation of the plaintiff below, or other third person, as to the genuineness of the paper. The decision of the Clerk, however, could not conclude the plaintiff in error; but it would be competent for him to show, that the writing filed as a release was not a compliance with the stipulation in the judgment.

The *scire facias* called upon the defendant to shew cause why the plaintiff should not have execution of his judgment; and the cause shown is, that a paper agreed to be filed as a condition on which execution was to issue, though filed, is not genuine. The question then is, did the Court err in its requisition as to the proof by which the release was to be disproved. This makes it necessary to consider to some extent the nature of the office, duties and powers of a notary public.

The office of a notary is of very ancient origin, and perhaps is recognized in all civilized countries as intimately connected with commerce. Independent of any statutory regulation extending the powers of a notary, his certificate is only evidence of such acts as he does under the *lex mercatoria*. And under the influence of this principle, it has been held, that a deed of partition made and acknowledged in Alabama, before a notary, was not proved in Louisiana by such acknowledgement. (Phillips v. Flint, 3 Miller's Lou. Rep. 146.) And in *ex parte Church et al.*, 1 Dowl. & Ryl. Rep. 324, the certificate of an American notary under his seal, that a power of attorney had been executed in his presence, which certificate was attested by the British Consul, was held in England to be no evidence of the execution of the power. There was a subscribing witness to the power, the Court said, "Probably in a Court of civil law, the notarial certificate would be sufficient; but in a Court of common law, we can only act upon the affidavit of a subscribing witness. We know of no instance in which the Courts have dispensed with such evidence of the execution of such an instrument." And in Maryland, it has been held, that the protest of a master of a vessel, made before a notary, is not evidence. (Patterson v. Maryland, Ins. Co., 3 Har. & Johns. Rep. 71.)

A consideration of the office of a notary, together with the decisions which have been made touching his duties, will show very satisfactorily that, in taking the acknowledgement or probate of instruments, so as to dispense with formal proof of execution in other States or countries, he has no more authority than any private individual. His certificate as to foreign protests, it is said, is accredited upon general principles of commercial policy and convenience; but even the *lex mercatoria*, does not recognize him as possessing authority to certify the execution of instruments, either upon acknowledgement of the facts, proof by witnesses, or otherwise. (3 Phill. Ev. 1259, C. & H.'s ed.)

But it is argued, that the third section of the act of 1803, "concerning notaries public," [Aik. Dig. 330,] has extended the powers of notaries, and that enactment made the certificate offered in the case at bar, evidence of the genuineness of the release. The section referred to is in these words: "The said notaries and each of them shall have power to receive the proof or acknowledgement of all instruments of writing relating to commerce or navigation, such as bills of sale, bottomries, mortgages and hypothecations of ships, vessels or boats, charter parties of affreightment, letters of attorney, and such other writings as are commonly proved or acknowledged before notaries in the United States; and also to make declarations and testify the truth thereof under their seal of office, concerning all matters by them done in their respective offices."

It is very clear, that a mere acquittance or release from the payment of a debt or some unliquidated liability, is not an instrument relating to commerce or navigation within the meaning of the act cited; and we think that it is not such a writing, as is "commonly proved or acknowledged before notaries within the United States." At least, the statutes of the different States, or perhaps a single one of them, show no such extension of notarial authority; and if there exists a custom in the States of the Union, which makes the proof or acknowledgement of such a paper, by the certificate of a notary evidence in a Court of justice, it was incumbent upon the plain-

tiff below to have shown it. Such a departure from the common law mode of proof cannot be presumed.

The certificate of the notary then, imparted no additional validity to the paper filed as a release; but the proof of its genuineness should have been adduced at the trial. It will therefore follow, that the Circuit Court erred in requiring the defendant "to impeach the notary as well as the signature of Taylor"; and the judgment is consequently reversed, and the cause remanded.

RODGERS v. WATERS AND OTHERS.

1. The penalty against a sheriff for failing to return a *ca sa* is five per cent per month on the amount of the judgment; the fine to be imposed by the Court in the exercise of a sound discretion, taking into consideration all the circumstances of the case.

Error to the Circuit Court of Pike.

THIS was a motion in the Court below against the sheriff of Butler county, and his sureties for failing to return a *capias ad satisfaciendum* issued by the clerk of the Circuit Court of Pike county, on a judgment of the plaintiff in error against one Hiram A. Sessions for fifteen hundred and eighty dollars, sixty-six cents. To the notice alledging these and other facts which was returned executed, the defendants demurred, and the Court sustained the demurrer, from which this writ of error is prosecuted.

The error assigned is the judgment on the demurrer.

Buford, for the plaintiff in error.—Peck, contra.

ORMOND, J.—The question presented on the record is, whether a sheriff is liable, on motion, to the amount of the judgment, for failing to return a *capias ad satisfaciendum*.

This presents a question of some difficulty, the solution of which can only be had by marshalling the different statutes on the subjects. The first act passed in 1807, Aik. Dig. 173. The seventy-third section provided "that when any writ of execution or attachment for not performing a decree in chancery, shall come to the possession of any sheriff, &c. and he shall fail to return the same according to law, that it shall be lawful for the Court, on motion of the party injured, to fine the sheriff five dollars per month for every hundred dollars contained in the judgment, on which the execution issued, from the return day of the execution, to the day of rendering judgment."

The succeeding section, provides for the case of a return by the sheriff, that he had levied the debt, and his failure on demand to pay over the amount collected by him on the *fieri facias*, or to a *ca sa*. that he had taken the body of the defendant, and shall have afterwards permitted the defendant to escape; in either of these cases the Court, on motion, were authorized to render judgment against the sheriff, for the amount of the judgment, with interest of fifteen per cent per annum from the return day of the execution.

By the act of 1819, Aik. Dig. 163, a penalty of six per cent. per month was to be inflicted on all sheriffs, who should on application, fail to pay over monies made by them on executions on motion of the party aggrieved.

The succeeding section is in these words "when any sheriff shall fail to perform the duties by this act required, the person or persons aggrieved, may move against such delinquent sheriff, and have judgment against such sheriff and his sureties in office, for the amount he has failed to pay over as aforesaid, or for failing to return the execution as above directed, in the Court in which such execution has issued, upon giving three days notice to such delinquent sheriff, or his sureties in office, provided," &c.

These are all the statutes which authorized the infliction of a specific penalty upon the sheriff, for failing to return an execution.

The only difficulty we have felt in this case was, whether we should conform to the decision made upon this statute, for

the failure to return a *ca sa*; in Minor's Rep. 376, and 1 Stewart 63, of McWhorter v. Marrs, where it was held that the penalty for such failure, was the amount of the judgment. We are entirely satisfied, that this is an incorrect exposition of the statute. The legislature were not providing for a failure to return a *ca sa*, but for a failure to pay over on a *fieri facias*; the 22 section, Aik. Dig. 163, declares that the penalty should be six per cent per month on the amount of the judgment. The twenty-third section gives a remedy by motion for this penalty for so failing to pay over, "*or for failing to return the execution in manner as above directed.*" The language "*in manner as above directed*" refers to the preceding section, which by no force of ingenuity can be warped so as to include a *ca sa*, as it speaks of *a levy and sale of the property thus levied on*, language which cannot by possibility apply to a *ca sa*. As therefore the 22nd section applied only to a writ of *fieri facias*, by no proper construction can the 23rd section be extended beyond it.

We are therefore fully satisfied that the construction which has been put upon this law is incorrect. In an ordinary case, we might feel ourselves constrained to acquiesce in an error which has been undisturbed so long. But in a case so highly penal in its character as this; we do not feel ourselves authorized to withhold from the defendants the right of having the law properly expounded. We are therefore of opinion, that no authority is given for proceeding against a sheriff, for failing to return a *ca sa*. by the act of 1819, sections 22 and 23 of Aikin's Digest 163-4, but that for such a default, the sheriff must be proceeded against under the act of 1807, Aikin's Digest, 173, section 73.

The penalty imposed by that act is a fine of five per cent per month for every hundred dollars contained in the judgment for failing to return an execution. This fine is to be imposed by the Court in the exercise of a sound discretion, taking into consideration all the circumstances of the case. [Pope & Hickman v. Stout, 1 Stewart 375; Hill v. The State Bank, 5 Porter 537.] The notice in this case, and the motion founded on it, is for the amount of the judgment in the original cause. The judgment is therefore affirmed.

RANSOM v. PETERS.

1. When the defendant, in an appeal cause pending in the Circuit Court, offers to make his defence against the plaintiff's demand, it is error if the Court refuse to hear the defence in proof by witnesses, that he agreed to abide by the decision of another case which was shewn to have been decided after the agreement. Such an agreement to be binding, must be in writing pursuant to the 15th rule of Court.

Writ of error to the Circuit Court of Marshall county.

APPEAL to the Circuit Court from the judgment of a justice of the peace for a sum under twenty dollars. The record declares that the parties came by their attornies, and the defendant offered to make his defence to the plaintiff's demand; but it appearing to the satisfaction of the Court, by the testimony of witnesses, that this cause was to abide the decision of a case against the said defendant, made at the March term, 1840, of the said Court; it was therefore considered that the plaintiff should recover against the defendant and his sureties in the appeal bond eight dollars and thirty cents. To this judgment the defendant excepted.

HOPKINS, for the plaintiff in error.

ROBINSON, for the defendant.

PER CURIAM.—The agreement to abide by the event of the decision of another cause against the defendant, seems to have been proved by witnesses. This was in direct contravention of the fourteenth rule of Court, which directs that no private agreement or consent between the parties or their attornies, relating to the proceedings in any cause, shall be alleged or suggested by either against the other, unless the same be in writing, and signed by the party to be bound thereby. The defendant insisted on his right to be heard, and was entitled to the benefit of the rule.

The Circuit Court erred in giving effect to a parol agreement respecting the proceedings. Let the judgment be reversed and remanded for further proceedings.

MYERS v. PEEK'S ADMINISTRATOR.

1. Although a deed undertaking to convey property, recites a valuable consideration, as an inducement to its execution, it is notwithstanding, competent for a creditor of, or purchaser from the grantor, to show, that it was intended as a mere gift.
2. A deed of gift of goods and chattels, where possession remains with the donor, will not, under the second section of the statute of frauds, vest a title in the donee, unless it is recorded; yet, it may be regarded as a parol declaration of the donor's wishes, and to make it operate as a gift, it is necessary to show that the subject was actually delivered.
3. Where a gift has not become complete by the registration of the deed, or the delivery of the thing, an undertaking by the donor to deliver the property at some particular place, is gratuitous, and confers upon the intended donee no legal right.
4. Where a person has the possession of property, under an agreement with another, that he will deliver it to him at a place designated, within a definite period, if the person for whose benefit the delivery was to be made, acquiesces in the failure to comply with the agreement without seeking to recover the property, he must (within the second section of the statute of frauds,) be considered as permitting the possession to remain unchanged.
5. *Semble*. Where the owner of personal property, voluntarily parts with the possession to another person, either with or without an express contract, there must be a "will or deed," declaring the "loan, reservation, or limitation of use, or property," proved and recorded, as required by the second section of the statute of frauds; or else the absolute property shall be taken to be with the possession in favor of creditors and purchasers.
6. The limitation prescribed by the second section of the statute of frauds, vests a complete title in the possessor of personal property, in favor of creditors and purchasers, which cannot be defeated by proof, that the purchaser had notice of the circumstances under which the possession was permitted.
7. Where a person purchases property with a knowledge of a defect in the title of a *remote* vendor, he may show in defence of his right, that his *immediate* vendor had no such notice.

Writ of error to the Circuit Court of Walker.

THIS was an action of trover by the defendant in error, against the plaintiff, to recover damages for a negro slave named Lucy, alledged to have been converted while she was the property of the intestate. The cause was tried on issues upon the pleas of "not guilty" and "the statute of limitations."

On the trial, the defendant below excepted to the ruling of

the presiding Judge. From the bill of exceptions, it appears, that the plaintiff offered in evidence a bill of sale, dated the 4th November, 1831, executed by James Peek, by which he professes to sell the slave in question to James R. Peek, the intestate, in consideration of one hundred dollars, "in hand paid." Sutton, a subscribing witness, testified that the bill of sale was executed in his presence; the consideration for the same, was the "natural love and affection of the grantor for his son, the grantee; and that the consideration expressed of one hundred dollars, was merely formal." That the slave was, at the time of the gift, about ten years of age, and because she was so young, was left with the donor to be carried by him to the State of Missouri, whither he expected to remove the following year; the donee, at the time of the gift, was removing to that State; but the donor abandoned the intention of following him. The slave never went into the possession of the donee, but remained with the donor.

Sutton, upon cross-examination stated, that he was the son-in-law of the donee, and that his wife was living, and entitled equally with the other children, to a distributive share of her father's estate. It was shown that the estate of the donee had been reported insolvent. Whereupon the counsel for the defendant, moved to exclude the testimony of the witness, who thereupon executed a release, of the following tenor, viz:

"Know all men by these presents, that I, John C. Sutton, do hereby release all my right and title, in and to the estate of James R. Peek, deceased, to the administrator and to the heirs and distributees of said James R. Peek, deceased. Witness my hand and seal, this 11th day of May, 1841.

JOHN C. SUTTON, [*Seal.*]

Signed, sealed, acknowledged and delivered in open Court, 11th May, 1841.

Test,

T. A. HEARD, Cl'k."

It was still insisted for the defendant, that the witness could not render himself competent by a release, and that if he could, the release executed, was insufficient; but the Court ruled, that the release made the witness competent. The plaintiff's counsel then offered to re-examine the witness; but it was not insisted on by the defendant, and consequently, not done.

The plaintiff then offered, evidence, tending to show, that the defendant obtained possession of the slave in 1837, and that she had remained in his possession ever since.

John Peek, a son of the donor, was introduced by the plaintiff, but objected to, by the defendant, on the ground of interest—the objection was overruled. This witness testified, that before his father mortgaged the slave in question, to the defendant, he was distinctly informed, that she belonged to the intestate, but not that a bill of sale had been executed. It was proved, that the defendant, before he took a mortgage of the slave from the donor, inquired of a witness, whether the intestate had a bill of sale for her, to which the witness replied, that he did not know ; whereupon, he said, he would risk the purchase. It was also shown, that subsequent to the mortgage, the defendant said the slave was claimed as the property of the intestate, but that his mortgage would soon run out, and then she would belong to him.

The paper purporting to be a bill of sale from James Peek to James R. Peek, did not appear to have been acknowledged or recorded.

The defendant, to maintain the issues on his part, introduced and proved a mortgage of the slave in question, from James Peek, the donor, dated the 14th December, 1837, and purporting to secure the sum of three hundred dollars, lent by the mortgagee to the mortgagor. It was shown, that the consideration of the mortgage was truly expressed therein, and that the defendant had taken possession of the slave, when the same was executed.

The defendant having proved the hand-writing of James, Peek, read an order from him to the defendant, dated, 4th Jan. 1838, requesting him, upon the payment of three hundred dollars, to deliver the negro, Lucy, to James Abel. The defendant then proved, by a subscribing witness, a bill of sale from James Abel to himself, for the slave in question ; that paper was dated the 26th of January, 1838, and expressed a consideration of six hundred dollars. The deposition of James Abel was next read, with a bill of sale thereto annexed, dated the 4th of January, 1838, by which James Peek, in consideration of eight hundred dollars, bargained and sold to him, the girl Lucy.

The defendant then proved, that James Peek, some time before the sale to Abel, stated that Lucy was his property, and after the sale, stated that he had sold her to Abel for cash, and had been paid.

The plaintiff then proved, that James Peek was seventy or eighty years of age, at the time of the sale to Abel. There was some evidence that, at that time, the mental powers of the vendor were impaired, (though, the evidence on that point was contradictory,) and shortly after, he died. It was further proved that, before the execution of the mortgage to the defendant, James Peek admitted that he held the slave for the intestate. There was no proof of adverse possession, before the loan of the money, which the mortgage was intended to secure. The plaintiff offered evidence, tending to show the value of Lucy, and that James Abel had practised a fraud on his vendor, in purchasing her. This was all the material evidence in the cause.

The objections to the evidence are duly reserved in the bill of exceptions.

The counsel for the defendant prayed the Court to instruct the jury.

1. If they believed the consideration of the bill of sale made by James to James R. Peek, was natural love and affection, and the slave was left with the former, and the bill not recorded and proved, no title to her vested in the latter.

2. If they believed, that James R. Peek, left the slave in question, in the possession of his father for three years before the bill of sale was made by James Peek to Abel, without demand made and pursued by due course of law, then the plaintiff could not recover, although the defendant had notice of the outstanding claim of the intestate.

3. If they believed the defendant was not a participant in the fraud, which Abel may have practised upon James Peek, then the plaintiff could not recover.

4. If the believed, the defendant acquired the peaceable possession of the slave under the mortgage to him, then it was essential to the plaintiff's right to recover, that a demand should have been made before suit brought.

5. That, as this suit was not instituted within six years, from

the date of the bill of sale from James to James R. Peek, the plaintiff could not recover.

Which several instructions the Court refused to give, as prayed. But charged the jury,

1. That natural love and affection, was a good consideration in law, and if they believed, that James Peek conveyed the slave in question, to James R. Peek, that the property vested in the latter, notwithstanding, the conveyance was not proved or recorded; yet, if the slave was left with the donor, his creditors or a subsequent purchaser, from him would be protected.

2. That three years peaceable possession of personal property, without demand made and pursued by due course of law, would give the possessor such a title, that his creditors and purchasers from him, would be protected in their claims and purchases; but if a purchaser knew, that the property was merely loaned, he would not be entitled, as against one having a better title than his vendor.

3. That if Abel obtained the slave in question, from Peek the father, by fraud, he acquired no property in her; that the fraud, if established, would vitiate the transaction; and that notwithstanding, the defendant was no party to the fraud, yet, if Abel had no title, he could impart none to him.

4. That if the defendant acquired possession of the slave lawfully, in virtue of the mortgage or otherwise, the plaintiff should prove a demand in order to entitle himself to the action; but if the possession was tortious, or a conversion was shown, then no demand was necessary; and if the defendant purchased the slave knowing that his vendor had no title, and converted her to his own use, then no demand was necessary.

5. That the intervention of six years between the date of the bill of sale from James to James R. Peek, and the commencement of the suit did not necessarily bar the action. That if James Peek held the property for his son, the statute of limitations did not begin to run, until his possession, became adverse to that of his son.

CRABB & COCHRAN, for the plaintiff in error.

L. CLARK, for the defendant.

COLLIER, C. J.—Although the paper by which James Peek proposed to transfer the slave Lucy to the intestate, recites a valuable consideration, yet it is competent for a creditor or purchaser to show, that the transfer was not induced by money, or any thing of value; but that the true consideration was, the natural love and affection which the father cherished for his son; and as the proof shows such to have been the character of the transaction, we will consider it upon the hypothesis, that it was intended as a gift.

By the second section of the statute of frauds, it is enacted, that if “any conveyance of goods or chattels, and be not on consideration, deemed valuable in law, it shall be taken to be fraudulent within this act; unless the same be by will, duly proved and recorded, or by deed in writing, acknowledged and proved,” &c., “within twelve months after the execution thereof; or unless possession shall really and *bona fide* remain with the donee.” It is not pretended, that the deed of gift in question, was acknowledged or proved and recorded; for the bill of exceptions explicitly informs us, that no such proof was adduced. It does not appear, that the slave was ever delivered to the donee, or that the donor, for a single moment, relinquished the possession—the bill of exceptions merely reciting, that it was proved she was left with the donor, on account of her tender years, &c. The deed not being recorded as required by the act. it was insufficient *in itself* to pass the title; but could only “be regarded as equivalent to a parol declaration of the donor’s wishes;” and in order to effectuate the object proposed, it is necessary to show, that the subject of the gift was actually delivered. [Seawell v. Glidden, 1 Ala. Rep. N. S. 52. is an authority very full to this point.]

Assuming the transaction between James Peek and the intestate, to have been intended as a gift, if the intention was never consummated the right of property remained unchanged, and the contract by which the father agreed to carry the slave to Missouri, was a mere gratuitous undertaking, imposing no legal obligation and conferring no legal right.

Let it however, be supposed, that the intestate acquired the slave by a purchase for a valuable consideration. or that all the constituents of a gift *inter vivos* were shown, and we will con-

sider whether the circumstances under which she was left with James Peek, constituted him a *loanee*. It was proved, that at the time of the transaction between the father and son, the latter was removing to the State of Missouri, and the former expected to remove thither the next year, and that the slave was left with him to be carried to his son; but he abandoned the design of removing, and she continued in his possession for more than six years, and until within a few months of his death. The circumstances under which the slave was left with James Peek, did not constitute a loan *eo instanti*, but the transaction was, what is technically called *a mandate*, viz.: a bailment of goods without reward, to be carried from place to place, or to have some act performed about them.

But although, such was the character of the bailment at the time it was made, yet the bailee cannot be considered a mandatory, as against his creditors and purchasers after the expiration of such a length of time as would warrant the inference, that James R. Peek, was advised of the abandonment of his intention to remove to Missouri. After that time, if no demand was made, or effort to recover the slave. the possession of the father would be regarded as permissive, and though, there was no contract for a loan, yet the law would consider him as a depository, holding for the benefit of the son, authorized to employ the slave in ordinary service, and bound to deliver her up when required. It may be well questioned whether James Peek incurred a legal obligation, to perform his engagement; for it has been repeatedly held, that where one party entrusts the performance of a business to another, who undertakes to do it gratuitously, but wholly omits it, no action will lie for the *nonfeasance*; but if he enters upon its execution, and does it amiss, through the want of due care, by which damages ensue to the other, an action lies for the *misfeasance*. [Thorne et al., v. Deas, 4 Johns. Rep. 44; Rutgers v. Lucet, 2 Johns. cases, 92; Else v. Gatward, 5 T. Rep. 143.]

Taking it then, that the possession of James Peek, in a reasonable time after he declined removing, was tacitly, if not expressly permitted, especially in the absence of proof showing it to have been tortious, or in any manner objected to, we think the law will regard it as a loan, within the last member of the

second section of the statute of frauds, which enactment is decisive to show, that the rights of creditors and purchasers are paramount. That section, after providing for conveyances of goods and chattels, not founded on valuable consideration, proceeds as follows : " And in like manner, where any loan of goods and chattels shall be pretended to have been made to any person, with whom, or those claiming under him, possession shall have remained by the space of three years, without demand made and pursued by due course of law, on the part of the pretended lender ; or where any reservation or limitation shall be pretended to have been made, of a use or property, by way of condition, reversion, remainder, or otherwise, in goods or chattels, the possession whereof shall have remained in another, as aforesaid, the same shall be taken, as to the creditors and purchasers, of the person aforesaid, so remaining in possession, to be fraudulent within this act ; and that the absolute property, is with the possession ; unless such loan, reservation, or limitation of use, or property, were declared by will or deed, in writing, proved and recorded as aforesaid." [Aik. Dig. 207.]

The provision which we have cited, does not form a part of the 29 Chas. 2, but is to be found in the statute of frauds, as enacted in Virginia, Kentucky and Tennessee ; the only material difference being a limitation of five, instead of three years, as in this State. Several decisions have been made in the two former States, touching this part of the statute, which as they may serve to aid us in its construction, we will briefly notice.

In *Beasley v. Owen*, 3 H. & M. Rep. 456, Judge Tucker thought, that the object of the statute of frauds and perjuries was to shut out all questions respecting property held in possession by a *debtor* or *vendor*, for the space of five years, as between a *creditor* of, or a *purchaser* from the person in whom such *possession* had remained without demand for that length of time, and the person claiming such property as his own, by virtue of any loan, reservation, or limitation of a use thereof, or property therein, unless such loan, &c., were declared by will or deed in writing, proved and recorded, as by that act is required. The learned Judge was consequently, much inclined to doubt, whether parol evidence of the loan of a slave, or

of the condition of such a loan, was admissible in a contest between a creditor or purchaser from the person in possession, after that possession shall have continued peaceably, and without demand, for five years. To sustain this view, the cases of *Jordan v. Murray*, 3 Call's Rep. 85, and *Turner v. Turner*, 1 Wash. Rep. 139, were cited. And it was decided in the case of *Beasley v. Owen*, that the recording of a deed or will, any time before the expiration of five years, was a sufficient declaration within the statute, to protect the rights of the lender or person having the absolute property against the creditors of, or a purchaser from the possessor. To the same effect is *Ferguson, &c., v. White*, 1 Marsh. Rep. 7.

In *Baylor v. Smither's heirs*, 1 Litt. Rep. 112, it appears, that an agreement was made between Shirley and the ancestor of the defendants, for the purchase and sale of a negro girl. By the agreement, Shirley was to pay four hundred dollars for the girl, part of which, was to be paid down, and the residue to be paid at some future period; but it was agreed, that if the residue, so thereafter to be paid, should, in fact, not be paid, the girl was to be returned to the ancestor, and the amount received by him refunded to Shirley. The Court said, "if Shirley had remained in possession of the girl for five years, before the commencement of this suit, it is conceded, that as to his creditors and purchasers, the condition would have been void and inoperative; for, after the conditional sale to him, the right of Smithers was in the nature of a reservation, dependent on the performance of the condition by Shirley; and there is a provision in the statute of frauds, in this country, expressly declaring fraudulent, all such reservations, where the possession remains with another for the space of five years, without demand made and pursued by due process of law, unless the reservation, &c., be declared by will or deed in writing, regularly proved and recorded."

The Court of appeals of Virginia, have decided, that five years uninterrupted possession of slaves, under a loan not evidenced by such a written declaration as the statute requires, vests a title in the loanee, which inures in favor of his creditors, and cannot be divested by his returning the same to the lender, after the expiration of that period. (*Garth's Ex'r. v.*

Barksdale, 4 Munf. Rep. 101.) And it was held by the same Court, that where the lender of slaves demands and receives them of the loanee, and thereupon immediately redelivers them to him to be held on the same terms as they were previously, such demand, receipt and redelivery being *in private*, shall not be sufficient to prevent the loanee's possession, from being considered as continuing in favor of creditors and purchasers. And although, a loan, or reservation be not declared in the manner prescribed by the statute; so that the property after the expiration of five years, becomes subject to the loanee's debt, yet it shall be effectual, as between the parties and their representatives. (Boyd and Swepson et al. v. Stainback et al. 5 Munf. Rep. 305.)

And in Kentucky it has been determined, that where a slave remains in the possession of a person for more than five years, without any evidence in writing, of a reservation, &c., he becomes liable for the debts of such person; and such a consequence will not be avoided, by showing that the possessor acquired the property in trust for another. (Craig v. Payne, 4 Bibb's Rep. 337.)

In Gay v. Moseley, 2 Munf. Rep. 443, it was decided, that where the loanee of a slave retained possession of her for more than five years, without any written declaration thereof, being made and recorded, as required by the statute of frauds and perjuries, the creditors of, or a purchaser from such loanee, would have a better claim to the slave, than the lender; although they had notice of the circumstances under which their debtor or vendor held the possession.

The cases cited, serve to show, that in order to bring a case within the provision of the statute of frauds we are considering, it is not necessary to prove, that the possession of the debtor or seller should be under a contract of bailment, technically called *commodatum*, or a *loan for use*. They maintain, that where the owner of personal property voluntarily parts with the possession to another person, either with or without an express contract, that there must be a "will or deed," declaring the "loan, reservation, or limitation of use, or property" proved and recorded as required by the statute; or else the absolute property shall be taken to be with the possession in favor

of creditors and purchasers. That the act was intended to suppress frauds and perjuries, we think, abundantly appears, both from the title and terms, in which it is expressed; and that it should receive a liberal interpretation in advancement of the ends proposed, is what will not be disputed at this day. (*Bank of the U. S. v. Lee et al.* 13 Pet. Rep. 101; *Cutter v. Hinton*, 6 Rand. Rep. 509.)

The last member of the second section is not restricted to a "loan," but extends to a case, "where any reservation or limitation shall be pretended to have been made, of a use of property, by way of condition, reservation, remainder, or otherwise, in goods and chattels, the possession whereof, shall have remained in another." These words are of exceedingly extensive meaning, and in order to promote the intention of the legislature, may, with perfect propriety, embrace a "reservation or limitation," not only *expressed and stipulated* by the parties, but one which the law *implies* from a given state of facts. The terms, "or otherwise," apply to every conceivable "reservation or limitation," whether they are to operate by way of "condition, reservation, remainder," or in any other manner known to the law.

The case of *Gay v. Mosely*, is a direct authority to show, that the limitation prescribed by the statute, vests a complete title in the possessor, in favor of creditors and purchasers, and that the title of a purchaser from him, cannot be defeated by proof that such purchaser had *notice* that his possession was merely permitted by another, to whom the absolute property belonged; unless there was a "reservation or limitation," declared, proved and recorded as the act directs. This decision, we think, is defensible not only upon a just construction of the act, but upon authority also. The statute, in the particular in which we are examining it, cannot be regarded as an ordinary registry act, intended to give notice of a writing, by authorizing its registration in an office designated for that purpose. It proposes to effect some thing more—it provides the manner in which one person shall retain his right to personal property, which he permits to go into the possession of another, and declares that if the directions of the act are not observed, the claims of creditors of, and purchasers from the possessor,

shall prevail against the proprietor, after the possession shall have continued for three years. Such a possession does not create a mere presumption of fact, that the title has been relinquished, but it authorizes a legal conclusion in favor of creditors and purchasers, which cannot be gainsayed; it relieves them from the necessity of inquiring into the state of the title, and excludes all evidence tending to show that they were advised of it. Notice in such a case can have no more influence upon the rights of a purchaser, than if the subject of the sale had been real estate, to which a third person claimed title under a previous verbal contract, which was wholly unexecuted. Besides, the statute declares that, where there is no reservation or limitation by will, &c., proved and recorded in conformity to its provisions, after three years such pretended limitation or reservation, "shall be taken as to the creditors and purchasers of the persons aforesaid, so remaining in possession, to be fraudulent within this act." Here is an unequivocal declaration, that a pretence of right by the lender, &c. shall be deemed a fraud on creditors and purchasers. And upon no correct principles of reasoning can notice to a purchaser expurgate the fraudulent act of the pretended owner of the property.

But we are not unaided in the construction of our statute; many decisions have been made upon a similar enactment, so far as the point before us is concerned, in accordance with the view we have taken. By the statute of the 27 Eliz. Ch. 4, all conveyances of land, &c. made with intent to defraud, &c. are declared to be void against subsequent purchasers "for money or other good consideration." [Dane's Ab. Ch. 109. Art. 9, Sec. 8; Roberts on Fraud. Con. 5, in note.] Under this statute it has been decided, that it is not material whether a subsequent purchaser has notice or not of a former fraudulent settlement; for it has been determined at law, and therefore must stand, that a man's having notice of a former settlement, which was fraudulent, shall not prevent his avoiding the same, as if he had been ignorant of it; because if he knew of the transaction, he knew it was void by law. (Dane's Ab. Ch. 109, Art. 9, Sec. 6. and cases there cited; Roberts on Fraud. Con. 16—39—44, 233, and cases there cited; 1 Story's Eq. 343, et post

and cases there cited ; Cathcart et al. v. Robinson, 5 Peter's Rep. 264.)

But admitting that the defendant had no title to the slave, because he received the mortgage with a knowledge of the intestate's claim ; yet if Abel at the time of his purchase had no notice of it, and practised no fraud on his vendor, his title was good, and the defendant having acquired all Abel's right, may invoke it in his defence.

The conclusions we have expressed upon the points considered, are opposed to several of the instructions given by the Circuit Judge to the jury, as will be readily seen by a reference to the statement of the case. Even supposing that the gift from James Peek to his son was complete, so as to vest a title in the latter, the possession of the father for more than three years without a *reservation or limitation of use or property made, proved, and recorded as the statute prescribes*, divests that title in favor of creditors and purchasers. Other questions are raised upon the record, but those examined, it is supposed, will lead to a decision of the cause upon its merits. Under this impression we have only to say, that the judgment is reversed and the cause remanded.

THE HEIRS OF BOND v. SMITH, ADMINISTRATOR.

1. When an executor or administrator petitions the County Court for leave to sell the lands of the deceased, on the ground that the personal estate is insufficient to pay all the just debts of the deceased, the heir may show that such debts are not a charge on the estate, being barred by the statute of limitations.
2. Since the creation of separate Chancery Courts, a cause cannot be transferred from the Orphans' Court to the Circuit Court, but it seems in such a case, Chancery would have jurisdiction.

Error to Sumter Circuit Court.

THIS was a petition filed in the Orphans' Court of Sumter county by the defendant in error, as administrator of John

Bond, deceased, setting forth that the personal estate of his intestate was insufficient to pay the just debts against the estate without a sale of the real estate, which is particularly described; the petition sets out the names of the heirs, and prays that commissioners be appointed, &c.

Upon this petition an order was made, that notice be given the heirs by publication in the Voice of Sumter, a newspaper published in the county; affidavit having been made that they were non-residents.

At a subsequent term an order was made that the Judge of the County Court having been of counsel for one of the parties, the cause, together with all orders and papers relating thereto, be transferred to the Circuit Court of Sumter county.

A guardian *ad litem* having been appointed to the infant heirs, he answered, denying the allegations of the petition. The widow of the deceased, who had since his death intermarried with one Walker, also answered, denying the allegations of the petition, and insisting that the deceased left personal property sufficient to pay all his just debts, that if any such pretended debts existed, they had long since been barred by the statute of limitations.

An issue being submitted to a jury, they rendered their verdict, that the personal property of the deceased, at the time of his death, and at the time of the filing of the petition was insufficient to pay his debts. Upon this verdict, the Court decreed a sale of the land, and appointed commissioners to carry the decree into effect.

Upon the trial of the issue, a bill of exceptions was taken by the defendants, from which among other things, not necessary to be noticed, it appears that before the trial of the issue, the defendants offered to file the plea of the statute of limitations to any and all the supposed debts of John Bond, deceased, which the Court refused; to which the defendants excepted.

Other objections were also taken to the testimony, which need not be here noticed, as the case went off on other grounds.

The defendants prosecute this writ, and assign for error, among other assignments, that the Court erred in refusing to permit the plaintiffs in error to insist on the plea of the statute of limitations.

HUNTINGTON, for plaintiffs in error, cited 2 Pickering 567; 2 Eq. Rep. 55; 2 Haywood, 7; 6 Johns. Chan. Rep. 360; 15 Vesey jr. 479; 13 Mass. 162; 7 Wheaton, 60; 1 Russel and Milne, 347; 1 Harrington, 218; 3 Johns. C. Rep. 319.

No counsel appeared for defendant in error.

ORMOND, J.—The principal question in this case, is the right of the heir to plead the statute of limitations, on an application by the administrator to sell real estate, to pay the debts of the ancestor, on the ground that the personal estate is insufficient for that purpose. This is a question of great moment, and has not been adjudicated in this Court.

The statute of this State on which this application is made, provides that it shall be lawful for an administrator or executor, who has not power by the will of the testator to pay debts to file a petition in the County Court, setting forth that the personal estate of the testator or intestate is insufficient for the payment of the just debts of such testator or intestate, describing the heirs the lands proposed to be sold, &c. Upon the filing of the petition, the Court is required to issue citations to such of the heirs as are of full age, and to appoint *guardians ad litem* to such as are minors; and it is made the duty of such guardian to deny the allegations of the petition. The Court is not authorized to decree a sale of the land where the allegations of the petition are denied, unless satisfied by proof. Such is a brief abstract of the law under which this proceeding is had. Aik. Dig. 180, 181.

It is very clear that the Legislature did not contemplate a sale of the lands, as a matter of course on the application of the executor or administrator, but required him to establish the allegations of his petition by proof, if denied by the heir; and where the heirs are infants, no admission can be made to dispense with this proof. What then is the allegation to be proved, it is that the personal estate is not sufficient to pay the just debts of the testator or intestate. To ascertain this, it is obviously necessary to inquire what debts are binding on the testator or intestate, and consequently a charge on the estate; and it seems to us that any defence which the ancestor could have made, if the suit had been brought against him, may be

made by the heir. The proceeding is in effect a suit by the creditors against the heirs, claiming satisfaction out of the estate which has descended to them for a debt due from the ancestor. It does not therefore rest with the administrator to say whether the bar of the statute of limitations shall be interposed or not; he is placed in an antagonist position to the heir, and cannot therefore make any admission which shall prejudice him. His power to meddle with the real estate is derived entirely from the statute; it is a special authority derived from the order of the Court on proof of the allegation of the petition, and confers no power further than is necessary to execute the trust with which he is clothed for the benefit of the creditors.

It is true, that while acting within his appropriate sphere, as the representative of the deceased, he may decline to interpose the bar of the statute to defeat a just claim; but when he lays down his character of representative of the deceased, and becomes a party litigant on behalf of the creditors, against the heirs, it would be a strange anomaly, if he should be allowed to dictate the defence.

The cases cited by the counsel for the plaintiff in error, demonstrate the law as here laid down. Thus, in the case of *Richmond, administrator petitioner, &c. 2 Pickering, 507*, it was held that an administrator could not, by his own promise, revive a debt due himself, barred by the statute of limitations, and leave to sell the real estate to pay such debt was refused. So in *Scott v. Hancock, 13 Mass. Rep. 162*, the Court refused a license to sell real estate on the application of an administrator, on the ground, that the debt, to pay which the land was proposed to be sold, was barred by the statute of limitations. In the case of *Mooers v. White and others, 6 John. C. Rep. 360*, in a most elaborate opinion, in which all the cases are noticed, Chancellor Kent held, that an acknowledgment or admission made by an executor or administrator, would not bind the real assets in the hands of an heir, or affect his right to plead the statute of limitations.

In *Shewen v. Vanderhorst, 1 Russell & Milne 347*, a residuary legatee had filed a bill to have an estate administered, and the trusts of the will carried into execution. An account

being ordered to be taken of the debts, a creditor went before the Master to prove a debt barred by the statute of limitations. The executor did not object, but the objection was taken by the plaintiff, and allowed by the Master. On exception to the Master's opinion, the Master of the Rolls affirmed it; and on appeal, his judgment was affirmed by Lord Chancellor Brougham. Many other authorities might be cited, but we consider the question free from doubt, that upon an application by an executor to sell real estate to pay debts, from a deficiency of personal assets, the heir may dispute the right to sell, and show that the supposed debts are barred by the statute of limitations.

The jurisdiction of the Circuit Court to entertain this application, has also been questioned in the argument; and although this point is not distinctly presented by the assignment of errors, as the cause must be remanded, we think it proper to examine it.

The record states that the cause was transferred to the Circuit Court of Sumter county, because the Judge of the County Court had been of counsel for one of the parties. The statutes relied on to sustain the jurisdiction, are the following:

“If any person shall be appointed Judge of any County Court in this State who was employed as counsel in any cause depending in said Court, the said cause shall be removed to the Circuit Court of said county.” [Aik. Dig. 246.] “In all settlements hereafter to be made by executors, administrators or guardians, with the Orphans' Court, in which the Judge of said Court may have been employed as counsel, or may be otherwise interested in such settlement, it shall be the duty of said Judge to give immediate information of the fact to one of the Judges of the Supreme or Circuit Courts, who shall thereupon issue a commission to three persons of the proper county, directing and empowering them to proceed to make said settlement, under the rules and regulations prescribed by law. Such settlement, when made as aforesaid, shall be duly recorded by the clerk of the Orphans' Court, and shall have all the force and effect of settlements made by the Judge of the Orphans' Court.” (Ib. 253.)

The law last cited evidently applies only to a final settlement of accounts, in order to close an administration or guardianship, and cannot with any propriety be construed to authorize the persons so appointed to do any thing more than to close the estate by making a final settlement. If the Legislature had intended to vest the persons so appointed with *all* the power of a Judge of the County Court, to do every thing necessary to the conduct of an administration suit, from its commencement to the final settlement, no language can well be conceived more inappropriate to effect the object.

The clause first cited manifestly applies to suits pending in the County Court proper, which are conducted according to the course of the common law. If, however, the term, *suit*, be considered broad enough to embrace a petition for the sale of lands to pay debts, it cannot be presumed that the Legislature intended to refer it to the common law side of the Circuit Court. At the time of the passage of this act, the Circuit Courts exercised chancery jurisdiction; and as there would be no great difficulty in adapting the flexible machinery of the Chancery Courts to suit the statutory mode of proceeding in the Orphans' Court, the cause would doubtless have been placed on the chancery docket. But since the separation of the common law and chancery powers of the Circuit Court, and the transfer of the latter to separate Courts, we cannot think the Circuit Court can take jurisdiction.

The powers of the Circuit Court are doubtless adequate to the ascertainment of the insufficiency of the personal estate of a deceased to pay his debts, and to order a sale of his land for that purpose; but there it would end. The proceeds of the land when sold, do not go into the hands of the administrator until he gives bond and surety faithfully to apply the proceeds. This bond must be made payable to the Judge of the County Court. But this is not all: the proceeds are to be applied rateably among the creditors, and their debts are to be ascertained by the Court, or by commissioners, previous to distribution. All this might have been accomplished by the Chancellor, moulding his proceeding as near as possible to the statutory regulation; but the common law Judge would be met at every step by obstacles difficult, if not impossible, to surmount.

It cannot be supposed that, by the word, *suit*, the Legislature meant merely an *incident* of a cause. It was doubtless intended that the tribunal to which the suit was transferred, should have power to conclude it. For, as the transfer to the Circuit Court was caused by the inability of the County Court to act in the matter, if the Circuit Court could not finish the litigation, it could not be brought to an end. We are therefore of opinion that, since the establishment of the separate Chancery Courts, this is a case unprovided for by statute. It has been urged, that the transfer should be to the Chancery Courts; but this would require a latitude of construction too nearly approaching to legislation to be adopted; especially as we do not doubt that, in such a case, the application could be made directly to a Court of Chancery, whose general powers over the subject would give the Court jurisdiction when the County Court had no power to act.

These views, as they dispose of the whole case, render it unnecessary to consider the other questions presented by the assignment of errors.

Let the judgment be reversed, and the cause remanded.

COLLIER, C. J.—I concur with my brothers in reversing the judgment of the Circuit Court, but cannot agree with them in the opinion, that the present is not a case which, under the statute, was transferrable to that Court. The act referred to, [Aik. Dig. 246,] is beneficial and remedial, and upon a just construction, authorizes the transfer of a cause from the Orphans' to the Circuit Court. An application for an order to sell the real estate of a testator or intestate, is a proceeding (however liberally conducted) at law; and should not, if the Circuit Court had equity jurisdiction, be placed on the Chancery side of that Court.

WITHERSPOON v. WALLIS ET ALS., STIPULATORS FOR THE STEAMBOAT ASIA.

1. When a steamboat or other craft is proceeded against according to the course of the admiralty, to enforce a lien under the act of 1836, (Aikin's Digest, 2 ed. 604,) the entering into the stipulation to perform the decree, which by the statute discharges the lien, does not make the stipulators parties to the suit.
2. According to the course of admiralty practice, exceptions are never allowed, unless they are raised on specific allegations.
3. When no claim is interposed, a decree of condemnation is a matter of course ; and if a stipulation is entered into under the statute, a judgment is rendered against the stipulators according to the condition of their stipulation. And they will not be permitted to inquire into the correctness of the decree of condemnation, except so far as it may be necessary to correct any error in the judgment against them as stipulators.

Writ of error to the Circuit Court of Lauderdale County.

THIS suit was commenced in the County Court, and is a proceeding under the act of 1836, [Digest 604,] to subject a steamboat to the payment of a demand alledged to constitute a lien.

The libel is unnecessary to be stated, as it is not included in the decision of the Court.

The steamboat was released from seizure on the stipulation of the defendants in error. This stipulation is conditioned to pay to the plaintiff in error such judgment as should be rendered on the said trial. At the return term of the process, the County Court rendered a decree of condemnation against the said boat, for the sum of thirteen hundred and eighty-four dollars and seventy cents, no one appearing in behalf of the said steamboat or her owners to defend the said libel. And it appearing to the satisfaction of the Court, that the defendants in error had entered into a bond conditioned to pay such judgment as should be rendered on the said libel, judgment was rendered against them for the amount for which the boat was condemned.

The defendants in error sued out their writ of error to reverse the judgment ; and in the Circuit Court, assigned several errors, all of which challenged the correctness of the judgment,

as against the steamboat, and against themselves as stipulators. The Circuit Court reversed the judgment, and remanded it to the County Court for further proceedings.

The libellant now prosecutes his writ of error, and assigns, that the judgment of the Circuit Court is erroneous, and that it should have affirmed, instead of reversing, the judgment of the County Court.

HOPKINS, for the plaintiff in error.

COOPER, contra.

GOLDTHWAITE, J.—1. The defendants in error were not in a condition to dispute the correctness of the judgment of condemnation. They have no other connexion with the suit than as stipulators to pay such judgment as should be rendered on the libel. It is true, that the stipulation assumes that they are the owners of the steamboat seized; but before they could be permitted to litigate the suit with the libellant, it was necessary for them to interpose a claim. The mode by which the parties defendants are made to such a suit as this, is very fully examined in *Reed v. Owen*, 9 Porter 180. And in *Livingston v. The steamboat Tallapoosa*, 9 Porter 111, we held, that stipulators did not become parties defendant by the stipulation; but that it was necessary they should interpose a claim if they wanted to contest the libellant's demand.

2. If these parties were now permitted to assume the character of parties litigant, it would overturn some of the most salutary rules of admiralty practice, according to the course of which exceptions are never allowed, unless raised on some specific allegation. Every matter of which the defendants in error now complain, could have been avoided, and if necessary, other parties could have been inserted in the libel. Nothing might have remained in such a state, either as to allegation or proof, as to call for revision. But instead of this, these persons, if they are owners, neglect to interpose any claim, and no *contestatio litis* is formed in the primary Court. They cannot now be heard, even if they appeared to be parties of record.

3. But it appears that no claim whatever was interposed by any one in the County Court: a decree of condemnation was therefore a matter of course. The defendants in error stipulate

to pay such judgment as shall be rendered on the libel. The decree of condemnation has been had, and judgment has been rendered against them for the amount of the condemnation which they have agreed to pay. If error was shewn or admitted to exist in the decree of condemnation, the defendants in error cannot be permitted to avail themselves of it. They are not allowed to inquire into the correctness of the condemnation, except so far as may be necessary to correct any error in the judgment against them as stipulators.

It is not pretended that the judgment is not in conformity with the stipulation, and therefore there is no error in the judgment of the County Court of which they can claim any advantage.

The judgment of the County Court must be reversed upon the authority of *Livingston v. Steamboat Tallapoosa*, before cited, and the case is remanded to that Court, with instructions to affirm the judgment of the County Court, and to render judgment on the writ of error, bond for the damages allowed by law.

This opinion applies to another case between the same parties, in which the same judgment is rendered.

DURETT v. SEWALL.

1. Where a father delivered a slave to a *friend* for the purpose of effecting a gift to an absent *infant* child, but immediately took the slave into his possession again, and retained the possession of her for several years, until he sold her—employing her as his own property: *Held*, that the delivery was not such an act, as divested the father of the dominion or property in the slave, or prevented him from reclaiming her; though the law might be otherwise, if the delivery had been made directly to the child.

THE appellee brought an action of detinue against the appellant in the Circuit Court of Mobile, for the recovery of a fe-

male slave, named Matilda. The declaration is in usual form, and the cause was tried on the plea a "*non detinet.*"

At the trial, a bill of exceptions was sealed by the presiding Judge, at the instance of the defendant. From the bill it appears, that the plaintiff offered evidence, to show that Lewis Sewall his father, did on the 21st October, 1826, make an absolute deed of gift to him of the slave sought to be recovered; but that deed had never been recorded in conformity to law.

At the time the deed was executed, the slave was delivered to Doctor William Stewart for the plaintiff, who paid one dollar to the donor, that sum being expressed as a consideration, in addition to natural love and affection. Whether all this took place at the house of Lewis Sewall, or at the residence of Dr. Stewart, seventeen miles distant, was doubtful from the proof. When the deed was executed, the donor was living in Monroe county in this State—the donee was a boy about thirteen years of age going to school in Georgia, where he remained for several years. Immediately upon the delivery of the slave to Dr. Stewart, she was returned to the possession of Lewis Sewall, who continued to employ her, as if she had been his own property.

A short time previous to the commencement of his suit, the plaintiff demanded the slave in controversy of the defendant, who thereto answered that she was in his possession, and was at the house of his sister, and that he would not give her up.

The defendant proved, that subsequent to 1826, the donor employed the slave as his, hired her out in Mobile, and received the hire to his own use; and that in 1831 or 1832, the sister-in-law of the defendant, purchased her for an adequate consideration, which she paid, and received a bill of sale from Dr. Stewart, executed under authority from Lewis Sewall. The defendant then gave evidence tending to show, that his sister-in-law was then in possession of the slave, and had been ever since her purchase—that he never had any possession or right of possession—the purchase being made by her.

It did not appear that the sister-in-law of the defendant ever had any notice of the plaintiff's title. Lewis Sewall was aged; had just lost his wife at the time the deed of gift bears date; was about disposing of his estate to visit his kindred in Georgia, and was free from debt.

The defendant's counsel thereupon moved the Court to instruct the jury, that if they believed the slave in question was the property of Lewis Sewall, and remained in his possession from the 21st October 1826, and was employed as his own until she was sold by him, the plaintiff was not entitled to recover her, if the defendant or those through whom he deduced title, were *bona fide* purchasers without notice. *Further*, if they believed there was no delivery of the slave, at the time of the execution of the deed, except to Stewart, and that immediately after such delivery, she was returned to the possession of the donor, and was employed by him, or controlled for his own use, until the sale to the person under whom the defendant claims, then the plaintiff cannot recover, if the purchase was *bona fide* and without notice of his claim. *And further*, if they believed the plaintiff was in Georgia at the time the deed was executed, and has never had any control over the slave, or did not reside with his father, until after the sale to the person under whom the defendant claims—that no delivery was made to any person, except to Stewart for the plaintiff, and that if such delivery was made, and possession retained but for an instant, the plaintiff cannot recover.

These instructions, the Court refused to give in the terms in which they were asked, but charged the jury as follows "If a father not indebted at the time, make a deed of gift to his child then under age—and the father deliver the deed to a third person for the benefit of the child, and at the same time deliver the slave, declaring the gift to such person to be for the benefit of the child; but the father keep possession of the slave on account of the infancy of the child—the child having no guardian appointed by law, but being under the care and control of the father, it is a valid gift, although the deed was never recorded. The father has no right to sell the slave, and if he does, the purchaser although he has no notice of the gift, and pay a full consideration, acquires nothing as against the title of the child."

The Court further charged, that if at the time of executing the deed, it was the intention of the donor to retain possession of the slave during his life for his own use, and to sell her if he thought proper; and in pursuance of such intention he re-

tained the possession and sold the slave to a *bona fide* purchaser without notice of the deed, that then the purchaser would have a perfect title; but if no such intention existed at the time of making the deed, that no subsequent act of the father could defeat the title of the child.

The Court also charged, that if the defendant, as the agent of his sister, had the control of the slave, and so declared at the time of demand made, and gave bond to respond to the result of the suit, then the action would lie against him.

To the refusal to charge and the charges given, the defendant excepted. It appears from the record, that a verdict was returned, and judgment rendered as follows: "we, the jury find for the plaintiff, and assess the value of the slave mentioned in the plaintiff's declaration, at eight hundred dollars, and the value of the hire of said slave, during her detention, at five hundred and twenty-five dollars. It is therefore considered by the Court, that the plaintiff have, and recover of the defendant the possession of said slave, or in default thereof, that he recover of the defendant, the aforesaid sum of eight hundred dollars, the value of the said slave, assessed by the jury aforesaid, five hundred and twenty-five dollars, the damages for her detention, together with the costs in this behalf expended."

To revise the judgment of the Circuit Court, the defendant has sued a writ of error to this Court.

CAMPBELL, for the plaintiff in error. This case is distinguishable from the case of *Sewall v. Glidden*, 1 Ala. Rep. N. S. 52. In that case the delivery of the slaves was subsequent to the execution of the deed; in this it was contemporaneous with it. Again: the delivery of possession in the present case, was a mere ceremonial transfer, while in reality, the possession remained with the donor; although the donee did not reside with his father.

The possession of the plaintiff in error, was not such as to have subjected him to an action of detinue, and the Court erred in the charge to the jury on this point. But conceding that in all this there is no error, yet it is conceived, that the verdict does not authorize the judgment for damages.

No counsel appeared for the defendant.

COLLIER, C. J.—It has been often said, that a gift is not good, unless it be by deed, or unless the subject of the gift be *actually delivered* to the donee. [Sewall v. Glidden, 1 Ala. Rep. N. S. 52 ; Sims by guardian v. Sims, adm'r. at last term; Chitty on Con. 4 Am. Ed. 44, and cases cited.] Although a deed was executed by the father, professing to give the slave in question to the plaintiff, yet that deed cannot so operate as to convey the title ; because it was not registered as required by the second section of the statute of frauds. [Sewall v. Glidden.] The question then is, was the gift ever consummated by a delivery of the subject ? It is not pretended, that Lewis Sewall, the father ever delivered the slave to his son, but that the delivery was made to Dr. Stewart for him. That the subject of a gift may be delivered to the agent of the intended donee, would seem unquestionable ; but the defendant in error was an infant at the time the gift was attempted to be made, and could not depute an agent to act for him ; nor does the proof show, that anything of the kind was *in fact* done. (Story on Agency, 3.)

The relation of principal and agent takes place wherever one person authorizes another to do acts, or make engagements in his name. (Paley on Agency, 1.) Dr. Stewart cannot be regarded as the agent of the defendant, for he neither did, nor could authorize him to represent him in receiving the donor's bounty ; but he was designated by the donor himself. Now is it competent for a father, who desires to give property to an infant child, to appoint some person as a depository for the intended donee ? We will not say, that a deposit of property in the hands of a third person, if allowed to remain there, would not authorize the donee to recover it, upon the ground, that the donor had relinquished all claim to it in his favor. But such is not the present case. The father *pro forma*, delivers the possession of the slave to a friend, for the purpose of effecting a gift to an absent infant son, but all this was done without relinquishing for an instant, the dominion or property ; for it is shown by the record, that the possession of the donor continued uninterruptedly for five or six years, and until he sold the slave.

If Dr. Stewart can be regarded as an agent of any person, it must be as the agent of the father. Thus considering him, the gift was never consummated; for the father, as by law he might do, reclaimed the slave, while it was yet in the possession of his agent. It is well settled, that an authority not coupled with, an interest may be revoked by the principal, at his own mere pleasure. (Story's Agency, 465, et post. and cases cited.) The act of revocation, need not be direct and express—it may be indirect, and the result of other acts; thus, in the present case, the withdrawal of the slave from the agent's possession, before the dominion of the intended donee had attached, put an end to his authority, and annulled everything that had been done towards perfecting a gift.

The record shows that, the father intended to make the son the object of his bounty, and doubtless thought that he had done so; but he failed to execute his intention in a very essential particular, viz: in parting with the dominion of the slave, by delivering her to the son. (See Chitty on Con. 45, to 48, 4 Am. Ed.) We do not undertake to say, that a gift may not be made to an infant, without placing his hand upon the thing given; or that a delivery may not be made to some person for him in his presence; a delivery under such circumstances, should perhaps be considered as actually made to the intended donee. But we maintain, that a mere formal delivery made to a person of the donor's choice, in the absence of him to whom it is proposed to make the gift, does not without a change of possession, invest the latter with the title of the former. The case of Sewall v. Glidden is unlike the present. The questions of law in that case, arose upon a special verdict; this Court thought it did not sufficiently appear from the finding, when, and to whom the delivery of the subject of the gift was made; and consequently remanded the cause, that a *venire facias de novo* might be awarded.

This cause must be considered as if the father himself was resisting a recovery by the son, for the plaintiff in error deduces title from the father, and has all the right which he had. If the gift was incomplete, as the evidence would indicate, it is entirely immaterial whether the purchaser from the father knew, what he had done towards giving the property to the de-

fendant. Other questions are raised, but the one examined, is decisive of the cause, unless other evidence shall be adduced, than that contained in the bill of exceptions, and we consequently decline considering them.

Injustice would often result, if principles the reverse of those we have laid down, were allowed to prevail; but the law, as we have ascertained it, will operate beneficially—if the intended donee be not present to receive the subject of the gift, a deed may be executed, which, if afterwards duly registered, will be efficient to pass title.

For the refusal of the Circuit Court, to instruct the jury conformably to this opinion, its judgment is reversed, and the cause remanded.

ADAMS & TAYLOR v. MCGREW.

1. A permission to the defendant to use a bill of exchange as a set off, and to be liable to the owner for the amount only in the event it can be made available as a set off, is not such a property in the bill as to entitle the defendant to use it as a set off.

Error to the County Court of Sumter.

THE action was on a promissory note by the plaintiff in error against the defendant in error. Under the plea of set off, the defendant offered in evidence a bill accepted by plaintiffs, which it was proved he received, and was to account for in the event only that he could make it available to him in a settlement with the plaintiffs, and if not, it was to be returned.

The plaintiffs moved the Court to instruct the jury, that the defendant, to make the bill available as a set off, must prove an absolute, unqualified property of the same in him; which the Court refused, and charged the jury that, if they were satisfied of the genuineness of the acceptance, and that the defendant

held the same under an agreement prior to the commencement of the suit by the plaintiffs, they must allow the bill as a set off; to which charge the plaintiffs excepted. A verdict and judgment being rendered for the defendant, the plaintiffs prosecute this writ of error; and now assign for error the charge of the Court given, and the refusal to charge.

SMITH & HARE, for the plaintiffs in error, cited 7 Porter 110, 549.

REAVIS & BOYD, contra.

ORMOND, J.—The charge of the Court cannot be supported. A demand, to be good as an offset, must be such an one as a suit could be maintained on; for an offset is in the nature of a cross action. The defendant had no property in the bill which he was allowed to set off against the plaintiffs' demand; but a permission to use it if he could make it available in a settlement with the plaintiffs, in which event only was he to account for it with the owner. This was not such a property in the bill as would constitute a set off against the plaintiffs' demand; and the judgment must therefore be reversed, and the cause remanded.

WARE v. BRADFORD.

1. After plea pleaded in an action of trespass to try title, no objection can be taken to the declaration either for form or substance, unless the insufficient description is carried into the verdict and judgment.
2. A sheriff's deed cannot be collaterally impeached for any irregularity in his proceedings, or in the process under which he sells. All that is essential in such a case is, a judgment, execution thereon, levy, and the sheriff's deed.
3. The statute which requires the sheriff to advertise lands thirty days before the sale, is directory merely.

Writ of error to the Circuit Court of Talladega County.

ACTION of trespass under the statute to try title and recover a tract of land.

In the endorsement on the writ, the land sought to be recovered is thus described: the southeast quarter of the northeast quarter of section one in township nineteen of range four east; and all that part of the *south half* of said section one, in said township and range, as is not included in a deed from defendant to William Thompson, in possession of the defendant. The same description is pursued in the declaration, except the *north half* is substituted for the *south half* in the endorsement of the writ. The case was tried on the general issue, and a verdict returned in these words: "the jury find for the plaintiff the lands described in the sheriff's deed, to wit: all that portion of laud commencing at the half mile stake on the eastern line of section one, in township nineteen, of range four east, in the Coosa Land District, to run from thence south $40^{\circ}5'$, west 41 27-100 chains to a stake; thence north $83^{\circ}30'$, west 9 60-100 chains to a stake; thence north $4^{\circ}35'$, west 12 38-100 chains to a stake; thence south $85^{\circ}10'$, west to the next boundary line of said section; thence northwest to the section line to the half mile stake; thence east to the beginning corner: also the southeast quarter of the northeast quarter of the same section, township and range. And we further find for the plaintiff, and assess his damages of rent, at eighty-four and fifty one-hundredths dollars." On the verdict, judgment was rendered, that the plaintiff recover of the defendant *the lands described in the said verdict*; for which a writ of, &c., and rendering judgment for the sum assessed and the costs of suit.

In the progress of the trial, the plaintiff introduced record evidence of three judgments, two in favor of the Bank of the State of Alabama, and the other in favor of *John W. Wright, jun.*, assignee, &c., and all of them against the defendant Ware. Also, a *fi. fa.* in favor of John Wright, jun., for the same sum as named in the judgment of John W. Wright, jun., assignee. This *fi. fa.* was returned, levied on two yoke of oxen and a gray mare, for which bonds were taken for the forthcoming of the same on the fourth Monday of April, 1839; and also returned forfeited.

The execution was objected to as inconsistent with the judgment. The objection was overruled, and the defendant excepted.

A *fi. fa.* at the suit of John Wright, jun., assignee, v. Bennet Ware and R. H. Ware, his security on the delivery bond, for the same amount of money as the last, except that the costs were increased two and eighty-seven one-hundredths dollars.

On this *fi. fa.* is endorsed a levy on lands under date of fourth June, which are described merely by initials and figures; and afterwards, under date of 27th August, 1839, is endorsed a levy describing lands precisely similar to that contained in the verdict. Then follows a statement, that the lands were sold in one body on the first Monday of October, 1839, before the court-house door in the town of Talladega, having given said defendant in execution personal notice of said levy and sale as required by law; that Bradford, the plaintiff in this action, became the purchaser, being the largest bidder, for twelve hundred dollars, which pays the execution, and the balance is retained to be applied to two executions from Tuscaloosa Circuit Court heretofore levied on the same land. Then follows a description of the *fi. fas.* in favor of the Bank.

All this was objected to by the defendant, because the execution was inconsistent and variant from the judgment. This was overruled, and the defendant excepted.

The defendant next objected to reading the execution, because the levy did not show a notice to the defendant of the levy. The Court permitted the sheriff to amend, and the amendment was made by inserting the words which appear in the levy and return, with respect to notice. To all this, the defendant objected, and excepted.

The sheriff's deed was then introduced, executed 7th October, 1839, and conveying the lands described in the levy to the plaintiff. Also, evidence conducing to prove that the lands described were the same on which the defendant resided at the date of the judgment; at the time of the sale, and up to time of trial. On a cross examination. it was proved, that when the sheriff offered the lands for sale, he proclaimed that it was the land on which defendant resided, and said he was going to

sell some lands, from a newspaper, and read from the newspaper the following advertisement:

“Will be sold before the court-house door in the town of Talladega, on the first Monday of October next, the following tracts or parcels of land, to wit”—here is inserted a description similar to that contained in the verdict, except that the numbers are designated by figures, and the courses are designated 40m. 5sr., and so throughout whenever degrees or minutes are indicated in the verdict.; and except, also, that the sixteenth of the section is designated as the southeast quarter of the *north quarter*, instead of the proper description.

The advertisement then proceeds to state as whose property, &c., it is to be sold; and is signed by the sheriff. It was proved, that a plot made by the description of the advertisement, would not include any of the lands mentioned in the sheriff's deed, except the forty acre tract, unless the bearings should be designated and the lines governed by the stakes and corners mentioned in the advertisement; but that if m. stood for degrees and s. for minutes, then a plot by the advertisement would include the lands described in the deed. It was also proved, that these letters, m. and s., were not used in common surveying. The plaintiff proved that the defendant was present when the sale was made by the sheriff, and made no objection so far as heard by the witness. Plaintiff also introduced a deed from the defendant to one William Thompson, and proved that the lands embraced by the sheriff's deed included all that portion of the south half of section one not included in Thompson's deed. He also proved the yearly value of the lands, and that they were situated in Talladega county.

The plaintiff closed his evidence, and no other evidence than stated was introduced. The defendant introduced no evidence whatever. After the plaintiff's attorney had commenced his concluding argument to the jury, the plaintiff offered to read in evidence the delivery bond for two yoke of steers and a gray mare, which bond was returned forfeited on the 1st April, 1839. The defendant objected to this bond in evidence, as it was then too late, and because it was inconsistent with all the other papers. The objection was overruled,

and the defendant excepted. The defendant then requested the Court to instruct the jury—

1st. That if the lands described by the advertisement under which the sheriff sold, were not the lands described in the sheriff's deed, then the jury ought to find for the defendant.

2d. That the sheriff could only sell and convey the lands described in the advertisement under which he sold; that the proclamation of the sheriff that they were the lands on which the defendant then resided, could give no authority to the sale and conveyance; and unless the lands described in the sheriff's deed to the plaintiff are the lands described in the advertisement, they ought to find for the defendant.

3. That the documentary evidence of title read by the plaintiff, was not sufficient to enable him to recover.

4th. That the plaintiff is bound to show that the defendant had such an estate in the lands as was liable to be sold under execution.

5th. That the plaintiff must have proved a notice to the defendant to quit possession, or he is not entitled to a verdict.

6th. That the plaintiff must have proved that the sheriff advertised the lands thirty days before the sale, or he is not entitled to recover.

All these charges were severally refused, and the jury instructed, that the title of a purchaser of lands at a sheriff's sale, is good if the sale is fair, and there is no fraud or collusion between the purchaser and the sheriff, even though the sheriff had wholly failed to advertise the lands.

The defendant excepted to the charges refused and given, and prosecutes this writ of error to reverse the judgment. He assigns that the Circuit Court erred in the several matters excepted to; and also, that the declaration is uncertain and insufficient—the verdict in the same condition, and variant from the declaration.

PECK, for the plaintiff.

STONE, contra.

GOLDTHWAITE, J.—1. The plaintiff in error, has relied, chiefly, on two positions, as showing error in the proceeding now to be examined. The first of these relates to the suppos-

ed variance in the description of the lands recovered by the verdict, from those described in the declaration ; and the second embraces all the supposed errors, and irregularities in the advertisement, and other proceedings previous to the execution of the deed.

The description of the lands in the declaration, is very vague and indeterminate. It can only be made certain by reference to a deed which is not pretended to be set out. This point was very fully considered in *Sturdevant v. The heirs Murrell*, of in 8 Porter 317, and the conclusion then, was, that in such a case as this, the declaration ought to describe the land in controversy with so much certainty and precision, as will inform the defendant what he is to defend against. But it was also held in that case, that after plea pleaded the objection to the declaration was unavailable, unless the insufficient description was also carried into the verdict and judgment. This decision was made in the terms of the statute of 1811, which provides, that after issue joined in an ejectment upon the title only, no exception to form or substance shall be taken to the declaration in any Court. [Aik. Dig. 266 S. 46.]

We think it evident, that the *north half* has been inserted in the transcript by a clerical mistake, as the endorsement of the writ corresponds in this particular with the verdict, and it is entirely out of the question, from all the evidence in the case, that the controversy had any thing to do with the *north half*, of the section of which the one-eighth had been before stated with certainty of description. We should feel well warranted therefore in deciding this to be a clerical error, and consequently, would omit to notice it, or consider it as amended.

2. But independent of this, we think it is covered by the statute. If no objection can be raised to the declaration after verdict, it cannot be placed in connexion with any other matter to show error, unless it be made a part of the subsequent proceedings. And in the latter event, the objection would not be to the declaration as such, but to the insufficiency of the verdict, if that formed the subject of complaint.

Such was the case in *Sturdevant v. Murrell's heirs*, before cited, when an insufficient description in the declaration was re-

ferred to as the description of the land in the verdict. We think that the variance cannot be now considered, and the verdict is certain and distinct. The only error consists in one of the lines running *to* the section line to the half mile stake, when it would have been more precisely accurate to have said *by* the section line to the stake.

3. All the questions raised at the trial with respect to the supposed irregularities may be disposed of with a very brief examination. Lands are declared subject to the payment of all judgments and decrees by the 9th section of the Act of 1812. (Digest 163.) And by the same Act it is declared, that the sheriff shall make a title to the purchaser, which shall vest all the defendant's title, &c. It is true, that by the same statute the sheriff is required to advertise the lands thirty days, but we consider this to be a direction to the sheriff merely, and cannot avoid the sale, when the enquiry is as to the effect of the sheriff's deed.

The question here presented, though novel in our own State, has frequently received adjudication elsewhere, and it may be assumed as settled law, that a sheriff's deed cannot be collaterally impeached for any irregularity in his proceedings, or in the process under which he sells. All that is essential in such a case, is a judgment, execution thereon, levy and the sheriff's deed.

In the case of *Wheaton v. Sexton*. 4 Wheat. 503, the Supreme Court of the United States expressed some astonishment, that a similar question should be raised in that Court, and say that the purchaser depends on the judgment, the levy and the deed. All other questions are between the parties and the Marshall.

So also, it has often been held, that the purchaser is not bound or affected by the irregular acts of the officer, or of the plaintiff, in which he did not participate. [*Kinney v. Scott*, 1 Bibb 155; *Rearden v. Searcy's heirs*, 2 Ibid. 202; *Brown v. Miller*, 3 J. J. Marshall 439.] Other cases might be adduced from other States, but it is unnecessary.

The reason why these irregularities do not form the subject of inquiry between the purchaser and the defendant in execu-

tion, seems to be, that the latter has an adequate remedy against the sheriff, for any injury he may have sustained.

Another reason why he will not be permitted to attack the deed collaterally, because the Court, where the judgment exists, can control the improper action of the sheriff, and set his proceedings aside, if any injury has resulted from his irregularities. This was held by this Court in the case of *Mobile Cotton Press and Building Co. v. Moore & Magee*, 9 Porter 679, where an irregular sale was set aside, after the execution of the sheriff's deed.

We are satisfied that the defendant can only enquire into the validity of the judgment in those cases, where his right has been divested by a sheriff's sale, after the levy of an execution. All other questions are between him and the plaintiff, or between the parties and the sheriff, or those claiming under him in a direct proceeding to set aside the deed for irregularity in the sale, &c. When this is not done the title of the purchaser cannot be impeached for any irregularity.

This leads to the conclusion, that the Circuit Court did not err in the charges given and refused.

The other questions presented by the exceptions have not been seriously pressed, and we do not consider ourselves called on to examine them.

Let the judgment be affirmed.

COLLIER, C. J.—After the defendant has pleaded "not guilty," to an action of trespass, to try titles, he cannot avail himself of an objection to the declaration. But the proof of the plaintiff must conform to his declaration—it is there we are to look, to ascertain what is in issue between the parties. If the plaintiff adduces evidence to prove his title to lands not described in the declaration, such proof is clearly inadmissible, and does not entitle him to recover.

Whether in the present case, the declaration as copied into the record, does not discover a clerical error, rather than a substantial misdescription of the land, we need not inquire.

ODEN v. STUBBLEFIELD.

1. The son being in possession of personal property belonging to his father, the father executed a deed of gift thereof to the son, reserving to himself by the deed the possession until his death. The donee and the defendant, who was a purchaser from him, retained the possession of the property for more than three years from the time the deed was made. Held, that to entitle the donor to recover, he must show a demand made and pursued by due course of law, or a registration of the deed upon such acknowledgement or proof as is required by the second section of the statute of frauds.
2. Where property is levied on by execution claimed by a third person, and a bond given to try the right, the pendency of such a proceeding, will not prevent the owner of the property from maintaining an action at law to recover the same of the claimant.
3. Where the measure of damages is the value of a life estate, the plaintiff, upon proof of the value of the absolute property, may recover nominal damages, if no more.
4. *Semble*—Where the plaintiff in an action of *detinue*, proves a life estate in slaves, the jury may ascertain by their verdict the value of the absolute property, and the judgment may be for the recovery of the slaves, or their alternate value: if the damages were limited to the value of the life estate, the defendant would pay the damages, instead of restoring the property, and thus defeat the object of the action.

THIS was an action of *detinue* brought by the defendant in error against the plaintiff in the Circuit Court of Talladega, for the recovery of a negro woman named Sally and her three children. The cause was tried upon an issue to the plea of *non detinet*. On the trial, a bill of exceptions was sealed at the instance of the defendant below. The defendant claimed the slaves in controversy under a bill of sale from Wm. F. Stubblefield, executed on the 18th April, 1839; and the latter deduced a title from the plaintiff under a deed of which the following is a copy, viz:

“*State of Alabama, Talladega county.*—Know all men by these presents, that I, John Stubblefield, for and in consideration of the natural love and affection which I have and bear towards my son, Wm. T. Stubblefield, as also for the further consideration of one dollar to me in hand paid at and before the sealing of these presents, the receipt whereof I do

hereby acknowledge, I have given, granted and confirmed, and by these presents do give, grant and confirm unto the said Wm. T. Stubblefield, his heirs and assigns forever, the following described property, to wit: one negro girl and child named Sally and Mariah, to have and to hold the said slaves, and the increase thereof, to the said Wm. T. Stubblefield, his heirs and assigns; and I do warrant and defend the same to the said Wm. T. Stubblefield, his heirs and assigns, against the claims and demands of all persons whatsoever. In witness whereof, I, the said John Stubblefield, have hereunto set my hand and seal. The above negroes are to remain in the possession of the said John Stubblefield until his death. Jan. 28, 1837.

JOHN STUBBLEFIELD. [Seal.]

In presence of
SOLOMON W. DUNN,
HUGH S. DARBY,

HENRY GIBSON, J. P. [Seal.]”

This deed was acknowledged before a justice of the peace of Talladega on the 6th February next succeeding its date, and recorded in the office of the clerk of the County Court of that county on the 8th of the same month.

It was proved, that Sally and her daughter Mariah, (being the only child then born,) were in the possession of Wm. T. Stubblefield at the date of the deed of gift to him, and so remained up the time he sold them to the defendant; and that the defendant has retained the possession ever since the purchase by him.

On the 25th November, 1839, the woman Sally and her two children were levied on by writs of *fieri facias*, which had previously issued from the Circuit Court of Talladega against Evan Ragland and Wm. T. Stubblefield; and on the 29th of the same month, they were claimed by the defendant as his property, who gave bonds with surety to try the right as provided by law. These suits for the trial of the right of property did not appear to have been determined when this cause was tried.

The plaintiff proved the value of the slaves in question, and their yearly hire; he also proved a demand of the defendant

in May, 1840, a few days previous to the commencement of this suit.

Among other instructions asked, the defendant moved the Court to instruct the jury—

First: That the deed from John to Wm. T. Stubblefield was not such an instrument as was required by the statute of frauds to be recorded, and that its registration in the clerk's office was not notice to the defendant of its contents. Which charge the Court refused to give; but instructed the jury, that the registration of the deed was notice to the world of what it contained.

Second: That if they believed the levy of the executions were not disposed of, and that the forthcoming bonds were still in force, then the slaves in controversy were in the custody of the law, and the plaintiff was not entitled to recover; unless a demand and refusal were shown to have taken place previous to the levy of the executions. Which charge was refused by the Court.

Third: That the proof of an absolute title to the slaves does not entitle the plaintiff to recover—he should have shown the value of an interest to continue during his life. This charge was also refused.

The jury having found a verdict in favor of the plaintiff below, and judgment being thereupon rendered, the defendant has prosecuted a writ of error to this Court.

LEFTWICH, for the plaintiff in error.

STONE, for the defendant.

COLLIER, C. J.—The second section of the statute of frauds, among other things, enacts, that a deed conveying goods and chattels only, shall be acknowledged and proved by one or more witnesses in the Superior Court, or County Court wherein one of the parties lives, within twelve months after the execution thereof; or unless possession shall really and *bona fide* remain with the donee. And where any loan of goods and chattels shall be pretended to have been made to any person, with whom or those claiming under him, possession shall have remained for the space of three years, without demand made and

pursued by course of law on the part of the pretended lender ; or where any reservation or limitation shall be pretended to have been made of a use or property, by way of condition, reversion, remainder or otherwise, in goods and chattels, the possession whereof shall have remained in another as aforesaid, the same shall be taken as to the creditors and purchasers of the persons so remaining in possession, to be fraudulent : and that the absolute property is with the possession ; unless such loan, reservation or limitation of use, or property, were declared by will or deed in writing, proved and recorded as aforesaid.

It is very clear under this act, that the deed of gift from the defendant in error to W. T. Stubblefield should have been recorded, in order to protect the reservation in favor of the former against the creditors and purchasers of the latter ; or else the donor should not have acquiesced in the continued possession of the donee, out should have asserted his right to the immediate enjoyment of the property. *Myers v. Peek's adm'r's*. decided at the present term, is conclusive of this point. And *Sewall v. Glidden*, 1 Ala. Rep. N. S. 52, shows that the acknowledgement of such a deed, made before a justice of the peace, does not authorize its registration, so as to prevent the consequences which result in favor of creditors and purchasers, where the right to personal property vests in one person, and the possession remains with another for the space of three years—registration which is irregular, does not impart to the world a constructive notice of the contents of the deed. But the plaintiff in error could not be prejudiced, even if he had actual notice of the reservation to the defendant—the statute declaring the deed to be *fraudulent*, unless it is recorded upon such acknowledgement or proof, as it prescribes. [*Myers v. Peek's adm'r's*.] The proof showing that the plaintiff was a purchaser from W. T. Stubblefield, with whom the possession remained from the time of the gift by the defendant, for a period which added to the plaintiff's possession, makes more than three years ; it necessarily follows that the Court erred in the charge given in answer to the first instruction asked.

Second : It was argued for the plaintiff in error, that as some of the slaves in question had been levied on by executions

against Ragland and W. T. Stubblefield, and bonds executed by him to try the right of property, the slaves were in the custody of the law, and the defendant could not maintain an action for their recovery; unless the demand of the possession had been made and refused previous to the levies. (Wallace v. McConnell, 13 Peter's Rep. 136.)

This argument we think cannot be maintained. It is needless to consider, whether a debt for the recovery of which an action is pending, can be attached; or whether property levied on, and claimed by a third person under the statute, can be again taken on execution while the trial of the right is pending: the present case is entirely unlike either of these. Here a party asserts a title to property which, if well founded, vested previous to the issuance of the executions, is independent of them, and paramount to any lien which the law can give. Such being its character, its assertion cannot be prevented by the acts or proceedings of others, in which the party suing had no agency. This point seems to us too clear to require further illustration. Any other conclusion than that we have stated, might seriously interfere with private rights.

Third: It is unnecessary to inquire whether the jury in assessing the value of the slaves, should have limited their price to a sum equivalent to the defendant's life estate; or whether the defendant should not have adduced proof of the value of his interest. The charge prayed was, that *he was not entitled to recover* upon the proof of the value of an absolute estate. Now, if the evidence of title was satisfactory, but there was no proof of value, it would be competent for the jury to find nominal damages; and the plaintiff might have a judgment accordingly.

But it is difficult to conceive of any legal reason why the defendant in error should not, if entitled to the slaves, have had a verdict and judgment for their full value, so as to coerce their delivery. The action is detinue, and the primary object to be effected, the recovery of the specific property, and if damages were assessed at a sum less than the value, the remedy in all probability would fail of answering the end proposed. Had the action been trover, there would be great force in the

argument, that the recovery should be limited to the damages actually sustained by the conversion.

For the error in the instructions given in answer to the first charge prayed, the judgment of the Circuit Court is reversed, and the cause remanded.

BATES v. THE BRANCH BANK AT MOBILE.

1. An endorser is not a surety within the meaning of the act for the relief of securities, Aik. Dig. 385, nor entitled to the benefit of the 6th section of that law; although such endorsement was made for the accommodation of the maker of the note.
2. In summary proceedings authorizing judgment on motion, the record must show affirmatively that the Court had jurisdiction; nor is this dispensed with by the appearance of the party.

Error to the Circuit Court of Mobile county.

THIS action was commenced at the Fall term, 1838, of the Circuit Court for Mobile county, by the Bank, by a notice which issued the 20th of August preceding, against the plaintiff in error, as endorser of a promissory note. The bank obtained judgment.

From a bill of exceptions taken by the defendant during the trial of the cause, it appears that the defendant, on the 17th April, 1837, gave the Bank notice in writing, that he was an accommodation endorser merely, on the note which was due and under protest, and requiring suit to be commenced. It was in evidence, that no Circuit Court was held in April, 1837, and no Circuit Court in June, 1837, for Mobile county. That a notice was issued to the Fall term, 1837, but no return or any proceedings had thereon.

The defendant moved the Court to charge the jury, that if they believed the facts stated in the notice to be true, and that it was given to the Bank, and that the Bank did not commence suit until the Fall term, 1837, which was in no manner

prosecuted, and no further proceedings had until the present term of the Court, that, that was not such a commencement and prosecution of the parties to the note, as will authorize them to sustain a suit against the defendant. And also, that if the note was given, and the facts stated in it true, that it was the duty of the bank to commence suit in a reasonable time. The third charge moved for, is in substance the same as the first. These charges the Court refused to give, and charged the jury that, unless the Bank required Bates to endorse the note, and knew that he did so without consideration, when the same was taken, the Bank was not required to commence and prosecute a suit, notwithstanding the notice, and the requirement therein contained.

To the refusal to charge, and to the charge given, the defendant excepted, and now assigns the same as error—and also, that it is not shewn by the record that the Court had jurisdiction.

CAMPBELL, for plaintiff in error.

ORMOND, J.—The question presented on this record, depends on the proper construction of a statute for the benefit of sureties, Aik. Dig. 385. “When any person or persons shall become bound as security by bond, bill, or note for the payment of money or any other article, and shall apprehend that his or their principal or principals is, or are likely to become insolvent, or to migrate from this State, without first discharging any such bond, bill, or note, it shall be lawful for such security or securities in every such case, provided an action shall have accrued on such bond, bill, or note, to require by notice in writing of his or their creditor or creditors forthwith to put the bond, bill, or note by which he or they may be bound as sureties as aforesaid in suit; and unless the creditor or creditors so required to put such bond, bill, or note in suit, shall in a reasonable time commence an action on such bond, bill, or note, and proceed with due diligence in the ordinary course of law, to recover judgment for and by execution to make the money due on such bond, bill, or note, the creditor or creditors so failing to comply with the requisition of such

security or securities, shall thereby forfeit the right which he or they otherwise would have had to demand and receive of such security or securities the amount which may be due by such bond, bill, or note.

The counsel for the plaintiff in error maintains that, the endorser of a note, is a surety, and that the plaintiff in error is therefore entitled to the benefits guarantied to sureties by the statute just cited.

There can be no doubt that each subsequent party to a bill, or note, is a surety for every preceding one; as he undertakes that if they do not pay the bill or note on demand at its maturity, that upon receiving legal notice of that fact, he will pay it. It results from this, that an agreement, on sufficient consideration, made by the holder, with any party to a bill or note, by which he disables himself from suing, or from collecting the amount, if matured into a judgment, will discharge all the subsequent parties. (English v. Darley, 2 Bos. & Pul. 51; Currie v. The Bank of Mobile, 8 Por. 360.) At common law therefore, an endorser is a surety, as to all those who stand before him on the paper, and is entitled to all the benefits which that relation confers, so far at least as to be protected against any contract which the holder may make, with any previous party to his prejudice or for delay.

The plain object of the statute we are considering, was to give a more ample remedy to a surety, than as such merely, he had at common law; and the precise question here is, whether *endorsers* were within the contemplation of the Legislature, and embraced in the general term "securities." It is impossible, we think, to affirm this proposition. The whole scope of the statute forbids such an interpretation. Thus, the 5th Sec. Aik. Dig. 385, which is the third in the original law. Toulmin Dig. 451, provides that no "security" shall distress his principal, by confessing judgment, or by suffering judgment to go by default, if the principal would enter himself defendant to the suit, and indemnify the "security" against loss. Now it is highly improbable, that this section was intended to apply to an endorser; no other party to a bill or note could become a co-defendant, without doing such violence to the rules of pleading, that we cannot presume the Legislature in-

tended it, without an express declaration to that effect. Again, by the 4th section of the same act, it is provided, that where judgment shall be rendered against one or more "securities," he or they may, on motion, cause a judgment to be entered against all the parties to the instrument, for their respective shares or proportions of the debt or damages. As there can be no contribution between endorsers, though they may have all endorsed for the accommodation of the drawer, and one alone is compelled to pay the debt, it follows that endorsers are not included in the provisions of this section. The remarks made in reference to the 4th and 5th sections, apply with equal force to the three preceding sections of the original law, as found in Toulmin's Dig., and as endorsers were clearly, not within the contemplation of the Legislature in the five first sections of the act, we cannot infer that they were intended to be embraced by the same general term "security" employed in the sixth section, even if there was nothing in that section to repel the presumption, that such was the intention. But, upon an examination of the 6th section, which is cited at length in the commencement of this opinion, it will appear that the Legislature used the term "security" in its popular sense of a surety, bound by the same instrument, and on the same conditions with the principal, as is most obvious from the language employed, "bound as security or securities on any bond, bill, or note." Now, with no propriety of language could two or more endorsers be said to be bound as "securities." Each it is true would stand in the relation of a surety, to other parties on the paper, but as between themselves, the relation of principal and surety would not exist; yet the statute evidently contemplates a community of interest between the sureties, upon whom the benefit is designed to be conferred.

Again, it may be observed that a surety is permitted to recover of his principal, not only the debt and interest thereon, which he may have been compelled to pay, but also the costs or suit; but an endorser who may have been compelled to pay by suit, cannot recover the costs of such suit of any prior party on the bill or note.

Upon the whole, we are satisfied that the Legislature did not contemplate endorsers as sureties, to be entitled to the

remedy conferred by the statute. Such an interpretation is not warranted by its terms; and so many and such great difficulties would occur in practice, by supposing endorsers to be included in the term securities, that we do not think they are within the spirit, as they certainly are not within the letter of the law.

Having attained the conclusion, that an endorser of a note or bill, is not a surety within the meaning of the statute in question, it is unimportant that the indorsement was not made for value, but for the accommodation of the maker of the note, although some stress appears to have been laid on that circumstance in the Court below. Whatever influence that fact might exert as between the endorser and the maker of the note, it can have no effect as between the holder and endorser considered in reference to any right given to a surety by this statute.

The view here taken of the statute, renders it unnecessary to consider the other questions made by the bill of exceptions.

But the record does not disclose that the certificate of the President of the Bank was produced, showing that the note on which the suit is founded, was the property of the Bank, and it does not therefore appear that the Court had jurisdiction to render a judgment in this summary mode.

It has been repeatedly held by this Court, that this fact must appear in the record, and is not waived by the appearance of the party. [See *Bates v. The Planters and Merchants Bank*, 8 Porter 99; *Curry v. The Bank of Mobile*, *ibid* 373.]

For this error the judgment must be reversed and the cause remanded.

TOWNS v. RIDDLE.

1. This Court will not revise the action of the Circuit Court in admitting evidence out of the usual course of proceeding. The course of proceeding is always within the discretion of the Court, and no revising Court can ascertain whether a departure from the usual course is calculated to advance or defeat the justice of the case.
2. If one co-surety to a note gives notice to the plaintiff to proceed by law to collect the note, and he is discharged by the omission of the plaintiff to sue, according to the notice, the principal becoming insolvent, all the other sureties are discharged by the same omission.
3. When a charge is correct in point of law, although there may be no evidence to warrant the charge, the judgment will not be reversed, unless the result shows, that the jury were misled by the generality of the charge.

Writ of error to the Circuit Court of Talladega County.

ACTION of assumpsit on twenty-seven promissory notes, each for the sum of fifty dollars, dated the 27th February, 1836, and payable on the 25th December then next. The defendant pleaded,

1. Non-assumpsit.

2. That the notes sued on were made by Conner and Walker as principals, and one Sylvanus Walker, and the defendant as sureties; that after the maturity of the notes, the defendant gave to the plaintiff a verbal notice to sue the makers thereof, which the plaintiff failed to do; that at the time of the said notice, the principals in the said notes were in possession of property sufficient to pay the said notes, and that they could then have been collected from the principals, if suit had then been commenced; that the said principals afterwards became, and continue to be, insolvent; and that if the defendant is now compelled to pay the said notes, he will be injured to the amount of the notes, through the mere neglect of the plaintiff, concluding with a verification.

Issues to the country were joined on both pleas, after the plaintiff had demurred to the second, but on which demurrer no judgment was required or had.

Verdict and judgment for the defendant.

In the progress of the trial a bill of exceptions was taken by the plaintiff, which discloses, that after the notes were given in evidence, the defendant introduced a witness, who testified, that in October, 1838, he was at the house of Sylvanus Walker, who is one of the makers of the notes, and heard his brother tell Mr. Garrett, who represented himself as the agent of the plaintiff, and who then said he had the notes now sued on, that he (Sylvanus Walker) and Gideon Riddle were securities on the notes, and that neither he nor the said Riddle would be bound, unless Towns would sue immediately on the notes. The defendant introduced another witness, who stated, that he was with the plaintiff, Towns, on one occasion, and was informed by him, that the security had notified his agent, Mr. Garrett, to sue on the notes; that the said agent had informed him that he had better sue, and that he would have done so, but for Conner and Walker, the principals, who had induced him not to sue; that the plaintiff also stated, that the defendant and Sylvanus Walker were sureties in the notes. Another witness proved the same facts.

The first witness examined, also stated, that Sylvanus Walker gave the notice as well for himself as in behalf of the defendant, but the said Walker did not then say he was the agent of the defendant; nor did he represent, that he had any authority from, or that he had been requested by the defendant, to give the notice to Garrett, the agent of the plaintiff.

Another witness stated, that David Conner, in the fall of 1838, had considerable property, some twenty or thirty negroes; that he was nevertheless, considerably involved in debt; he purchased seven negroes from said Conner in January, 1839, and appropriated the sum agreed to be paid for them, to divers, claims against Conner; that Conner failed in the winter of 1839, say in January or February; and left the State, taking with him twelve or thirteen negroes; that if a judgment had been obtained against Conner at the May term of the Circuit Court, for the year 1839, nothing could have been made upon it.

It was also offered in proof, that Sylvanus Walker was insolvent when he gave the notice to the plaintiff to sue. The defendant then closed his evidence.

The plaintiff then adduced evidence conducing to establish the insolvency of Conner and Walker at the time the notice was given to sue. After the plaintiff had closed his case by this rebutting evidence, the defendant again offered evidence, to which the plaintiff objected, on the ground, that the defendant had before concluded his case. The objection was overruled, (it is not stated in the exceptions, whether witnesses were examined, and if so, their testimony is either omitted, or is contained in the previous part of the bill.)

This being all the proof, the Court charged the jury that the law did not make joint securities agents for each other, and that unless Sylvanus Walker had authority from Gideon Riddle, (the defendant) to give the notice, the jury should not consider it as Riddle's act; but the jury might infer from the beneficial nature of the act, and a subsequent ratification of it by Riddle, by his failure to disaffirm it, or by his acting under, or acquiescing in it, that it was his act. To this charge, the plaintiff excepted.

The plaintiff requested the Court to instruct the jury, that, if Riddle had ratified the act of Sylvanus Walker, that unless a notice of his ratification had been communicated to the plaintiff, it would not amount to a notice, so as to discharge the defendant. This the Court refused and the plaintiff excepted.

The Court then charged the jury, that if any agreement was made by the payee of the notes, and the principal payor, without the consent of the sureties, materially changing the original contract, either as to amount or time of payment, that such *new contract* would absolve the surety from liability. To this charge, the plaintiff excepted.

The plaintiff prosecutes the writ of error, and assigns the several matters arising out of the exceptions taken at the trial, and also that the Court erred in charging the jury on questions of law, which were not involved in the evidence before the jury.

STONE, for the plaintiff in error, admitted that the correctness in point of law of the last charge, could not be controverted; but he insisted, that by it the jury was misled and drawn from the consideration of the facts in evidence, to others which were not attempted to be proved.

MOODY, contra.

GOLDTHWAITE, J.—1. We cannot examine the question, which is presented by the bill of exceptions in relation to the course pursued in permitting the defendant to examine witnesses, after the plaintiff had closed his rebutting evidence, for the purpose of revising the action of the Court, because the course of trial is entirely within the discretion of the Court; and because it is impossible for any revising tribunal constituted of judges, different from those, who preside in the Circuits to ascertain whether the particular proceeding complained of, is calculated to advance or defeat the justice of the case. We might be inclined to think the reasons assigned in the bill of exceptions insufficient to authorize a departure from the common mode of examination, but we are not informed, nor can we be, that injury has, thereby resulted to the plaintiff.

2. The instructions given by the Circuit Court in relation to the supposed agency of one of the sureties, in giving notice to the plaintiff to commence suit against the principals, is certainly involved in much obscurity; but it is equally certain, that the charge was more favorable to the plaintiff than he had the right to call for, and therefore, cannot be assigned as error, unless it was calculated to mislead the jury. We understand the charge to be, that it was necessary for the jury to believe that Walker acted as the agent of his co-surety, the defendant, when he gave the plaintiff notice to sue the principal debtors; but that this might be inferred from the beneficial consequences to be derived from the notice, especially, as the defendant had never thus affirmed it. We consider the law of such a case to be, that whenever one co-surety is discharged in consequence of the omission to sue after such notice has been given the discharge must enure to the benefit of all the sureties; and this rests on this obvious principle, that if one surety is discharged from the contract, his obligation to his co-surety is also discharged, and never can be revived. The plaintiff cannot, in such a case, recover against any one of the sureties, because the right of contribution, which before existed has been destroyed by the omission of the plaintiff to do that which equity requires him to do, when called on by a surety.

The charge when examined means nothing more than this, that the notice to sue was such a matter as enured to the ben-

efit of the defendant, unless the act was disaffirmed by him. We are unable to see how, or in what manner this could prejudice the plaintiff.

3. The only other error complained of, is that the other charge given did not arise out of the evidence, and was calculated to mislead the jury, from a consideration of the true question—the insolvency of the principals—after the period when the money could have been collected, if they had been sued immediately after the notice was given. The charge is admitted to be correct in point of law. We are not prepared to say that any evidence was before the jury from which a *contract* to give additional time to the principals could be properly inferred; it is possible that the defendant may have considered it differently, and both parties may have conceded, that the inducement spoken of by the witnesses was a contract. It was clearly the duty of the plaintiff to have requested a more specific charge, if the one then given was calculated to affect his rights injuriously, in consequence of any misapprehension by the Court of the legal effect of the evidence before the jury. In the case of *Herbert v. Huie*, 1 Alabama Rep. N. S. 18, the consequences of neglecting to request a specific charge are thus stated. “If the Court refuses to give a charge improperly asked for, and then charge the jury wrong in point of law—the case must be reversed. But this is not the case here; the charge is right and the objection, in effect, is, that the Court did not inform the jury of its own mere motion, what constituted a *bona fide* purchaser or holder for a valuable consideration.”

So, in the present case, the complaint is, that the Circuit Court did not, of its own mere motion, inform the jury what were the facts necessary to constitute a new contract between the plaintiff and the principal debtors.

It is not necessary to controvert the position that juries may be misled by charges which are obnoxious to no legal criticism. The case of *Sims v. Sims*, 8 Porter 449, presents an example of such a charge; but there it was immediately connected with the evidence, and the result showed, that the jury was misled by it. It is not impossible, that in this case the jury may have been misled by the generality of the charge; but there is

nothing in the result of the case, which leads necessarily to such a conclusion; it may have been decided entirely on the ground, that the principals became insolvent, after the money might have been collected, if they had been sued. We may speculate on the causes which influenced the verdict, but we can arrive at no certain result.

There is no error, and the judgment is affirmed.

ALSTON v. HEARTMAN, TREASURER, &c.

1. A promissory note, payable "to the Treasurer of the Manual Labor Institute of South Alabama," is a contract with the corporation, and no action can be sustained thereon in the name of the Treasurer; and the law would be the same, even if the association was not incorporated.

THE defendant in error brought an action of assumpsit against the plaintiff in the Circuit Court of Clarke on a promissory note of the following tenor: "Twelve months after date I promise to pay to the order of the Treasurer of the Manual Labor Institute of South Alabama, with interest, fifty dollars, payable and negotiable at the Branch Bank of the State at Mobile. February 26th, 1838. W. W. ALSTON."

The declaration alleges the presentment of the note at the Bank at maturity, and its non-payment; and describes the plaintiff as Treasurer of the Manual Labor Institute of South Alabama, but does not aver in usual form that he is the Treasurer of the corporation.

A judgment by default was rendered against the defendant, to revise which he prosecutes a writ of error to this Court.

B. F. PORTER, for the plaintiff in error.

CRABB & COCHRAN, for the defendant.

COLLIER, C. J.—The points made by the assignment of errors, are—

1. The suit should have been brought in the name of the corporation, and not its Treasurer.

2. If the suit was properly brought, it should have been *distinctly averred* in the declaration, that the plaintiff was the Treasurer of the corporation.

1. It is an acknowledged principle of the common law, that whenever a *legal right* is created or liability imposed in favor of, or upon one or more persons by means of a promissory note, that right may be asserted, and that liability enforced by action, by and against all those persons. (Chitty on Bills, 566-9, Am. ed.) Let us test this question by that principle. Here the maker of the note did not contract with the plaintiff *eo nomine*, but his undertaking, literally interpreted, is to pay to "the Treasurer of the Manual Labor Institute of South Alabama,"—not to the individual who may fill that office at the time the note bears date, but to the officer, without reference to the changes that may be made in the office. Now, if the Treasurer for the time being could maintain an action on the note in his own name, by transmitting the right from incumbent to successor *ad infinitum*, it is clear, that his office would become *quasi* a corporation, and possess one of its essential attributes without the aid of a legislative grant.

The reasonable interpretation of the note upon its face is, that it is an engagement to pay a sum of money to which the Manual Labor institute was entitled, and the Treasurer, as its proper depository, was to receive it. In this view, no legal right to sue vested in the Treasurer, the corporation was the party contracted with, and in its name the action should be brought.

Where a contract appears to have been made with a corporation, though agents are employed to effect it, and there be a written promise to pay the agents *eo nomine*, it has been held, that the corporation must sue for the breach of such a contract. [Gilmore v. Pope, 5 Mass. Rep. 491. See also Bower v. Morris, 2 Taunt. Rep. 387; African Society v. Varick, 13 Johns. Rep. 38. See also 1 Pen. Rep. 115.]

But where there is nothing on the face of the writing to shew that the corporation was a party to the contract, though its name may be mentioned, the action must be brought in the name of the party who takes the legal interest. Thus in *Buffum v. Chadwick*, 8 Mass. Rep. 103, a promissory note was payable to Arnold Buffum, agent of the Providence Hat Manufacturing Company, it was held, that an action lay by Arnold Buffum on the note, and his styling himself agent, &c. in his writ and declaration, was merely *descriptio personæ*. (*Greenfield v. Yeates*, 2 Rawles' Rep. 158; *Binney v. Plumley*, 5 Verm. 500.)

In *Ewing v. Medlock*, 5 Porter's Rep. 82, a promise in writing was made to the treasurer of an unincorporated association of individuals—it was held, that the contract was not with the individual who might be treasurer, but with the association; and that the treasurer could not maintain an action upon it. All the reasoning employed in that case, goes to shew, that the present suit is improperly brought.

We have considered this case upon the assumption, that the Manual Labor Institute was a corporation, without citing the statute that made it such, because its corporate character is undisputed; but whether it be corporate or otherwise, the decision of the question examined must be the same.

Without examining the second point made, the judgment of the Circuit Court is reversed.

COFFEY, USE &C. v. WILSON & GUNTER.

1. Where a judgment is improperly entered by mistake of the clerk, and at the succeeding term amended *nunc pro tunc*, before which term a writ of error *coram vobis* was sued out, and the judgment superseded—held that, although the writ of error *coram vobis* might be wholly irregular, it could not be assigned as error, because there was no final action of the Court upon it, and its influence was spent on a void judgment.

Error to the County Court of Jackson.

THIS proceeding was commenced originally before a justice of the peace, by the plaintiff against the defendants. The plaintiff having obtained judgment, the defendants appealed to the County Court of Jackson, where a judgment was also obtained by the plaintiff, and an entry appears, that a motion for a new trial made by the defendants, was overruled.

After the adjournment of the Court, the clerk issued a writ of error *coram vobis* in the cause, directed to the judge of the County Court, and upon which the judge endorsed, that it should operate as a *supersedeas* to the execution which had issued on bond, and security being given, &c.

At the succeeding term of the Court an entry was made, which recites, that it appeared to the satisfaction of the Court, that the motion of the defendant for a new trial at the last term had been granted, and was by mistake entered by the clerk, as having been overruled, and the order for a new trial was then made *nunc pro tunc*.

At a subsequent term of the Court a trial was had, and judgment rendered for the defendants. From this judgment the plaintiff prosecutes this writ of error, and assigns for error

1. There was no writ of error granted by the Court.
2. There was no petition for one.
3. The writ issued by the clerk was without authority and void.
4. The judge had no power to grant a *supersedeas*.
5. The Court erred in setting the verdict aside, and granting a new trial.

ROBINSON, for plaintiff in error.—HOPKINS, contra.

ORMOND, J.—We are relieved from the necessity of considering the assignments of error, which relate to the writ of error *coram vobis* which issued in this cause, because, conceding it to have been wholly irregular, there was no final action of the Court upon it; nor did it exert any influence upon the judgment finally entered in the cause.

The first judgment which was suspended by the writ of error *coram vobis* was, as subsequently appears, improperly ren-

Little, Administrator de bonis non of Beazley, deceased v. Beazley.

dered from an incorrect entry made by the clerk, that a new trial was refused by the Court, when in fact it had been granted, and should have been so entered. This error was at the succeeding term corrected by the Court *nunc pro tunc*.

The only effect then of the writ of error *coram vobis* was to suspend a judgment entered by mistake, and conceding the writ to be irregular, it certainly cannot be complained of, when its action was spent upon a void judgment.

That every Court must have the power to correct its own entries, so as to make them speak the truth of the case, is too clear to be controverted, even after the adjournment of the Court, on sufficient evidence, that an error of fact has been committed.

The judgment of the Court below is therefore affirmed.

LITTLE, ADMINISTRATOR DE BONIS NON OF BEAZLEY, DECEASED v. BEAZLEY.

1. Proven specimens of the hand writing of the defendant cannot be given in evidence to the jury, to be compared by them with the signature to the writing, the genuineness of which is controverted.

Writ of error to the County Court of Sumter county.

ACTION of assumpsit on a promissory note. Plea putting in issue the execution of the note. Verdict and judgment for the defendant.

At the trial the plaintiff offered in evidence "proven specimens of the hand writing of the defendant, to go to the jury, to be compared by them with the hand writing of the note sued on, and with its signature thereto; which specimens, though proved on the trial, were excluded, and not permitted to be shewn to the jury." The plaintiff excepted and brings the case to this Court by writ of error, to revise the opinion of the County Court on this point.

Little, Administrator de bonis non of Beazley, deceased v. Beazley.

REAVIS, for the plaintiff in error, cited 8 Con. Rep. 55; 5 N. H. Rep. 367; 5 Verm. 532; 6 Rand. 316; 2 Leigh. 249; 11 Mass 309; 2 Greenl'f. 33; 1 Root, 307; Anthons N. Pr. 109 1 Esp. 351; 2 N. & McC; 400; 2 Starkie Ev. 374, note g, and cases there cited; 5 Binn. 340, 349; Addison 33; 2 McCord, 518; 2 John. cases 211; 19 John. 134; 1 Gall. 175; 10 S. & R. 110; 3 N. H. 47.

JONES, contra, referred the Court to 2 Starkie on Ev. 654; 1 Philips Ev. 490; 3 ibid Cowen and Hill's notes, 326; 9 Cowen, 94; 6 Peters 763; 3 N. H. R. 4; Pope v. Askew, 1 Battle, 16; Perry v. Newton, 5 A. & E. 514.

GOLDTHWAITE, J.—This is one of those questions upon which so much has been said and written, that a review of all the cases would be alike impracticable and uninteresting. We shall therefore content ourselves with declaring the rule as we consider it to exist at the present day. Comparison of hand writing by submitting different writings having no connexion with the matter in issue, is not permitted by law. The present case presents the naked question, whether signatures proved to be in the defendant's writing, can be given in evidence to the jury, to enable them to determine, by a comparison with the disputed signature, whether the latter is genuine or otherwise. In our opinion, this was not competent evidence. We decline entering into a discussion, whether there are any cases in which mere comparison is permitted, though it is obvious, that when more than one paper is before the jury as evidence, a comparison will be made, if any dispute takes place, as to the authenticity of either. We may also add our wish to be considered as neither deciding nor intimating an opinion on any other than the precise question now presented.

Let the judgment be affirmed.

FOWLKES & CO. v. BALDWIN, KENT & CO.

1. Where the writ describes the defendants as partners, and is returned executed generally, or on either of them, the *prima facie* intendment, according to the practice under the statute of 1818 is, that the defendants are partners, and the service of process is sufficient to bring them all before the Court.
2. *Semble*. If a judgment is rendered against a party who is not a partner, and who was not served with process, it will be competent for a Court of equity to perpetually enjoin its recovery.
3. Where one of several defendants sued on a promissory note as partners, proposes to show, that he was not a partner, he must interpose a plea supported by affidavit, which puts in issue the making or adoption of the note by him.

THE defendant in error brought an action of assumpsit against the plaintiffs in the County Court of Sumter, founded on a promissory note for eleven hundred and twenty-four and five one-hundredths dollars. The defendants in the writ are described as "Henry A. Fowlkes and Phineas Fowlkes, partners under the name, firm and style of H. A. Fowlkes & Co."

Henry A. Fowlkes, one of the defendants, pleaded 1. *Non assumpsit*. 2. That he never made and delivered with Phineas Fowlkes the promissory note declared on, to the plaintiffs. Issue was joined on the first plea, and to the second there was a demurrer.

In the record it appears, that the counsel for the plaintiffs in error at the July term, 1840, of the County Court, entered an appearance in this case as follows: "we appear for all upon whom process has been legally executed." It is further shown that, at the same term, the sheriff returned the writ executed generally, and that at the succeeding term of that Court, the Sheriff upon leave given, amended his return so as to make it read thus "executed on Henry A. Fowlkes, 2d day of July, 1840. Phineas Fowlkes not found."

A judgment by default was rendered against Phineas Fowlkes, and the demurrer to the second plea of the other defendant was sustained; thereupon the cause was submitted to the jury on his first plea. On the trial, the presiding Judge sealed a bill of exceptions at the instance of Henry A. Fowlkes, by which it is shewn, that the only evidence introduced, was

the note described in the declaration; whereupon, the defendant moved the Court to instruct the jury, that if the partnership of H. A. Fowlkes & Co. had not been proved otherwise than by the production of the note, they must find for the defendant, which instruction the Court refused, and the defendant excepted.

And a verdict and judgment being rendered in favor of the plaintiffs, the defendants have sued a writ of error to this Court.

SMITH, for the plaintiffs in error.

REAVIS, contra.

COLLIER, C. J.—By the eighth section of the act of 1818, “for the better regulation of judicial proceedings” it is enacted, that “when a writ shall be issued against all the partners of any firm, service of the same on any one of them shall be deemed equivalent to a service on all; and the plaintiff may file his declaration, and proceed to judgment, as if the said writ had been served on each defendant; and the judgment shall be equally valid and effectual against all the defendants.” In the present case, the writ describes the plaintiffs in error as partners, and this in practice has been heretofore considered as sufficient *prima facie* evidence, that such is the relation of the defendants to each other. And a return by the sheriff that the writ in such case has been executed generally, or on either of the defendants, must consequently bring them into Court, so as to authorize a judgment by default against all. Whether the rights of the defendants not personally served, would not have been better protected by requiring (even in the absence of a negative plea) proof to be made that the defendants were partners, we need not inquire, as the construction of the statute has always been otherwise. If a judgment has been rendered against a party who is not a partner, and who was not served with process, it will be competent for a Court of equity to afford him relief by perpetually injunctioning its recovery.

It is enacted by a statute of this State, that it shall not be lawful for the defendant in any suit to deny the execution of any writing, the foundation of an action, unless it be by plea, supported by affidavit. [Aik. Dig. 283.]

In the case at bar it is alledged in the declaration, that the defendants are partners, and that in that character they made the note declared on. Will not a plea, denying the existence of the partnership, put in issue the execution of the note, as much as if the latter fact was negatived by a direct and positive allegation? It most certainly will. And if a different conclusion was attained, it would be very easy for defendants, when sued as partners, by a mere change of phraseology in their plea to evade to a great extent the act last cited.

Again: the denial of the existence of a partnership does not respond to the entire declaration. By such a plea, the defendant does not in express terms deny the execution of the note, yet such an inference necessarily follows; for if the note was executed by the assent of both the defendants, with the understanding that it was to bind them, it would be quite as obligatory, as if it had been subscribed by them severally. The demurrer then, to the plea of Henry A. Fowlkes was rightfully sustained.

Where persons are sued as partners for the recovery of a demand, not evidenced by writing, they will be allowed to throw upon the plaintiff the proof of their joint liability, without filing a plea verified by affidavit. Thus, in an action of *assumpsit*, where the declaration merely contains the common counts, the plea of *non assumpsit* will be sufficient for that purpose. [Findley & Buchanan v. Stevenson, 3 Stew. Rep. 48.]

This view may suffice to show, that both the defendants below were in contemplation of law served with process, and that the second plea interposed by the defendant who appeared, was bad, and the instructions to the jury properly refused.

It remains but to add that the judgment of the County Court is affirmed.

BAGBY, GOVERNOR, USE, &c. v. McRAE.

1. The bond required of clerks by the act of 1812, Aik. Dig. 82, is now applicable only to clerks of the County Courts; and the bond required by the act of 1819, to clerks of the Circuit Court.
2. The conditions of the bond required by these laws are substantially the same.
3. The condition of a bond of a clerk of a Circuit Court, "that he will duly and faithfully execute his said office according to law, and that he will not remove or suffer to be removed out of the County of Mobile, the records and papers of the Court whereof he is clerk, or any part thereof," is, in substance, the condition of the bond required by the act of 1819.
4. The official bond of a clerk of the Circuit Court, cannot be put in suit in the name of the Governor for the use of the person aggrieved; but must be sued in his name, on the assignment of the Governor.
5. Such assignment is a mere authority to sue, and does not convey the legal title and therefore the bond may be assigned again, and until the whole penalty is recovered.

Error to the County Court of Mobile County.

THIS was an action of debt in the Court below, brought by the plaintiff in error, for the use of John T. Adams against Malcolm J. McRae, on his official bond as clerk of the Circuit Court of Mobile County.

The declaration assigned as a breach of the condition of the bond, that the defendant had taken insufficient sureties to an injunction bond. The defendant cravedoyer of the bond, and condition, and demurred to the declaration. The bond and condition is thus set out anoyer.

State of Alabama—Mobile County.

Know all men by these presents, that we, Malcolm J. McRae, Henry Bass, Isaiah D. Fuller, John B. Hogan and Charles Cullum, are held and firmly bound unto Hugh McVay, acting Governor of the State of Alabama, and his successors in office, in the just and full sum of ten thousand dollars, to which payment, well and truly to be made, we bind ourselves and each of our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, &c. The condition of the above obligation is such, that where-

as Malcolm J. McRae has been duly elected clerk of the Circuit Court of Mobile County. Now, if the said Malcolm J. McRae shall duly and faithfully execute his said office according to law, and shall not remove, or suffer to be removed out of the County of Mobile aforesaid, the records and papers of the Court whereof he is clerk, or any part thereof, except in cases allowed by law, then the above obligation to be void, else to remain in full force and virtue. Signed, &c.

Which demurrer was sustained by the Court, and judgment rendered for the defendant. From this judgment, the plaintiff prosecutes this writ of error, and now assigns for error, the judgment of the Court sustaining the demurrer.

STEWART, contended that the action was well brought in the name of the Governor, that the statutory remedy was cumulative merely, as there were no words of restriction, and cited, 1 Call. 243; Devereux 383; 3 *ibid.* 86.

That the bond was good and might be treated as a bond at common law. [2 Stewart 509; 2 Porter 493.]

PECK & CLARKE, contra.

ORMOND, J.—The decision of the question must depend on the construction of the statutes to be found in Aik. Dig. 82.

The first act passed in 1812, is to the following effect: “Every clerk shall, at the time of his admission and qualification, enter into bond with security, to be approved of by the Court in the penalty of five thousand dollars, payable to the Governor and his successors in office, with condition for the due and faithful execution of his office, and that he will not remove or suffer to be removed out of the County, the records and papers of the Court whereof, he is clerk, or any part thereof, except in cases allowed by law; which bond shall be recorded and then delivered to the presiding Judge of the Court, and be by him transmitted to the Secretary’s office within three months after it is so executed, there to be registered and safely kept among the papers of his office; and may be prosecuted upon and the penalty thereof recovered against any such clerk, for any malfeasance in office; and any clerk presuming to execute his office without first entering into such bond, shall forfeit and pay one thousand dollars and suffer three months imprison-

ment. A copy of such bond shall be good in evidence, and have the same validity, as the original, if it were present in Court."

The other statute passed in 1819, is as follows: "The clerks of the several Circuit Courts shall give bond with security, payable to the Governor and his successors in office, in the penalty of ten thousand dollars, for the safe keeping of the records and the faithful discharge of the duties of their offices, which bond shall be lodged in the office of the Secretary of State, and may be put in suit, on the assignment of the Governor by the party or parties injured in his or their own name, and shall not become void on the first recovery, but may from time to time be put in suit, by action of debt until the whole penalty be recovered; and if it shall be discovered that any of the said clerks shall have violated the oath prescribed by the Constitution, or willingly or corruptly have done any thing contrary to the true intent and meaning of the same, such clerk shall be deemed, upon conviction, guilty of misbehaviour in office, and shall be removed therefrom, and shall forever be incapable of holding any office civil or military in the State."

The act of 1812, applied both to the clerks of the Circuit and County Courts, until the passage of the act of 1819, since which time, the latter act relates to the clerks of the Circuit Courts, and the first act applies alone to clerks of the County Courts. The penalty of the bond required by these acts, to be given by the clerks of the County and Circuit Courts is different, as is also, the consequence which, by law, follows a breach of the condition of the respective bonds, for misbehaviour in office; but we are unable to perceive any substantial difference between the conditions of the two bonds required by the statutes cited, to be executed by clerks of the County and Circuit Courts respectively; although there is a slight alteration of the language first employed in the act last cited, we can perceive, no difference in the legal effect.

Neither do we perceive any difference between the legal effect of the condition of the bond in this case, and that required by the act of 1819; and although it is always the safest course to employ the language of a statute in reciting the condition of a statutory bond, yet any language of equivalent im-

port, and having the same legal effect will be a compliance with the statute. The condition recited in the statute, is "for the safe keeping of the records, and the faithful discharge of the duties of the office." The language employed in the condition of this bond, is "that he will duly and faithfully execute his said office according to law," which is certainly the same thing as *the faithful discharge of the duties of his office*; "and that he will not remove or suffer to be removed out of the County of Mobile aforesaid, the records and papers of the Court whereof he is clerk, or any part thereof," which is a new paraphrase of the language of the act, *safe keeping of the records*.

The condition of the bond being as we have seen, a substantial compliance with the statute the remaining question is, whether the suit is properly brought in the name of the Governor, for the use of the person aggrieved, or whether the suit should not have been in his name, on the assignment of the bond by the Governor. No reason has occurred to us, which would justify a departure from the plain and positive directions of the statute, that the bond may be put in suit on the assignment of the Governor by the party injured in his own name. The argument, that the Governor may refuse his assignment of the bond cannot avail; we must presume that an officer of the State upon whom, by law an official duty is devolved, will obey its mandate. Nor is there any force in the objection, that if once assigned, it could not afterwards be assigned to another. The statute is express, that "it shall not become void on the first recovery, but may, from time to time be put in suit by action of debt, until the whole penalty be recovered." The assignment therefore, under the statute was not intended to transfer the legal title to the bond, but is merely an authority to put the bond in suit for the benefit of the party aggrieved, and which may therefore, be repeated as often as there is necessity for it, until the penalty is exhausted.

We have been referred to an authority from North Carolina, said to be reported in the 2 vol. of Dev. Rep. 383, which it is said, is expressly in point and in favor of the plaintiff in error, whilst a decision expressly adverse, is said to have been made by the Supreme Court of Tennessee; but we have not had the

benefit of these reasoning of their Courts, to see on what principle the decision is based, and considered as mere authority, they neutralize each other, and can exert no influence.

Whatever may have been the facts in the cases referred to, in this case we consider the direction of the statute plain and clear—free from any ambiguity or doubt. It is a benefit conferred to be enjoyed in a mode distinctly and plainly marked out; and therefore, without speculating upon the consequences, or entering upon the consideration of the question, whether the mode adopted in this case, is not as good as the one pointed out in the statute, we are of opinion, that the directions of the statute must be pursued to obtain a recovery on this bond, as a statutory bond.

The judgment of the Court below is, therefore affirmed.

MEADOR & MEADOR v. SORSBY.

1. Land acquired after the execution of a will, does not pass by a general devise; nor will a power contained in the will, to sell all the estate of the testator, authorize the executor to sell after-acquired land.
2. An order of the County Court, directing the administrators to sell pursuant to the will, land acquired previous to its execution, is a nullity.
3. The rule of law is the same, whether the title of the deceased to the land was legal or equitable.
4. The purchaser at such a sale may rescind the contract; and the case is not varied by the fact that a deed for the land has been executed by the person holding the legal title, to be delivered to the purchaser on the payment of the purchase money; as the minor heirs would not be precluded from asserting their title when they came of age.
5. Whether after-acquired land may not pass, by a will clearly indicating such an intention.—*Quere.*

Writ of error to the Court of Chancery for the third District of the Southern Division.

THE bill seeks a rescission of a contract for the purchase of lands. The case as stated in the bill is this: The complainant purchased a tract of land at a public sale conducted by the defendants, as the administrators, with the will annexed, of James Meador, on a credit of twelve months, for which he gave his note, and received a bond executed by one of the defendants, conditioned to make a good and sufficient title in fee simple for the land. The complainant entered into possession, and held the land until after suit was instituted on the note, and until a short time before filing this bill, at which time he abandoned it. The will of James Meador, under which the defendants acted, is dated the 4th of September, 1833, and is in these words:

"This the first and last will of James Meador, now being in my right mind and knowledge. I do wish my property to remain until the first of January, 1836, and leave my son, John Meador, to act as overseer, until that time expires. Then I leave my beloved wife, Elizabeth Meador, three negroes, Jacob, Denis and Tilda, and two horses, to be chosen; some hogs and cattle, sufficient for a reasonable support; and the tract of land I now live on, which is two hundred and eighteen acres, her life time; and at her death to be equally divided among the heirs. Then, when John's time is out, sell and divide equally the rest according to what they have had of my estate. Some have had some and some have had none. And the balance of my estate remaining in Carolina, to be collected and sold, and equally divided among my lawful heirs. When I do hereunto set my hand and seal, this 4th September, in the year A. D. 1833.

his

JAMES X MEADOR."

mark.

The will was attested by two witnesses, and admitted to probate on the 22d August, 1836; and the defendants appointed administrators with the will annexed. On the 14th November, 1836, an order was made by the County Court of Greene county, authorizing the defendants to sell the real estate of the decedent on a credit of twelve months, according to the provisions of the decedent's will.

The lands purchased by the complainant at the sale made by the defendants under this order, were not purchased by the

decedent until after the date of the will, and he acquired them some time in the year 1835. At the time of his death, the legal title had not been conveyed, but remained in one Kirkpatrick, from whom the decedent purchased them. James Meador left several heirs, of whom some are infants under the age of twenty-one years. The bill alleges, that the defendants are incapable of making a valid title for the said lands, and prays that the contract of sale may be rescinded, the defendants enjoined from prosecuting the note, and that it be given up to be cancelled.

The will, probate, order of sale and bond are made exhibits.

The answer of the defendants admits, that they sold the land to the complainant under and by virtue of the power contained in the will, and according to the direction contained in the order of the County Court. They insist, that James Meador, at the time when he died, was in possession of the land; that he purchased the same from Kirkpatrick, and held his bond to make titles to the same, dated the 30th January, 1835; but they cannot state when the decedent obtained possession of the land in question, whether before or after the date of the will; and that they are advised that this fact is unimportant, as he was certainly in possession of the land when he died. They insist, that when the sale was made, the complainant fully understood that the legal title to the land remained in Kirkpatrick, but the purchase money having been paid, he was ready to convey the title to whomsoever the defendants should designate. That Kirkpatrick had executed a deed in fee simple for the said land to the complainant, which the defendants were ready to deliver to him whenever the purchase money was paid. They admit also that the decedent left several heirs some of whom are minors.

The testimony of several witnesses was taken on behalf of the complainant; but it is unnecessary to state their testimony, as the opinion of the Court is formed on the bill and answers alone.

At the hearing the depositions were shewn to be in the hand writing of the complainant; and the Chancellor was requested to exclude them, on the ground that he was a solicitor in the cause, within the meaning of the 11th rule of chancery practice.

The Chancellor overruled the exception, and decreed the rescission of the contract; reinstated the injunction which, at a former term, had been dissolved, and made it perpetual.

This decree is now sought to be reversed by the defendants, who assign that the Chancellor erred in overruling the exception to the depositions, as well as in the decree on the merits of the case.

PIERCE, for the plaintiff in error, insisted—

1. That the will was to be considered as taking effect only from the death of the decedent, and therefore was effectual to pass the subsequently acquired land.

2. If this is not the case, then the will may be considered as conferring a power to sell on whomsoever might be appointed administrator with the will annexed; and this power could attach to the after-acquired lands.

3. But if the will cannot be considered as operative on *lands*, or effectual as a power of sale, then it might be effectual to pass the peculiar interest which the decedent had to this land, which was nothing more than a possessory interest.

4. If the merits were adverse to the plaintiff in error, they must prevail on the exception to the depositions; and also, because the complainant, if his allegations are true, had a complete remedy at law. [Wiley v. White, 3 Stew. & P. 355.]

JONES, contra.

GOLDTHWAITE, J.—1. The principal question involved in this case is, that which relates to the power of the defendants to sell the lands, which were the subject of the contract sought to be rescinded, either under the will of their testator, or under the order of the County Court.

The order of the County Court is not very much relied on; nor can it be, for it directs the defendants to sell the lands in accordance with the will; and there has been no proceedings under any of the statutes which permit a sale to be decreed under peculiar circumstances. We may then dismiss the order of Court from consideration; for it is very clear, that the contract is not warranted by that alone.

At first, we were inclined to think it would be necessary to look into the evidence to ascertain when the title of the de-

ceased Meador commenced ; but on a more particular examination, we find a very distinct admission, that the title bond from Kirkpatrick was executed on the 30th January, 1835 ; and the subsequent declaration, that the defendants cannot state when their testator obtained the possession of the land, whether before or after the date of his will is wholly unimportant, for the reason that the equitable title is not shewn to have existed at any time anterior to the date of the bond.

Our statute of wills is not very dissimilar from those in force in England, and is in these words: Every person of the age of twenty-one years, of sound mind, lawfully seized of any lands, tenements, or hereditaments, within this State, in his own right in fee simple, or for the life or lives of any other person or persons, shall have power to give, devise, and dispose of the same by last will and testament in writing ; provided, &c. [Aikin's Digest, 448 s. 1.]

It is the settled law of England, that after-acquired lands are unaffected by a will. [Antkin v. Bakerham, Rep. Temp. Holt 750.]

The same doctrine has been held and frequently acted on in this country. (McKinnon v. Thompson, 3 John. Chan. 307; Livingston v. Newkirk, ib. 312.) In Virginia, where the statute authorizes the disposition by will of the lands which the testator has, *or, at the time of his death, shall have*, it has been held, that the intention of the testator to make his will apply to after-acquired lands, should appear in the will. [Hamersly v. 3 Call 289.] And this construction

of the statute was confirmed by the Supreme Court of the United States in the case of Smith v. Edrington, 8 Cranch 67. The same rule seems to prevail in Kentucky. [Holloway v. Buck, 4 Litt. 293.]

We are not aware of any decisions elsewhere to the contrary.

It is scarcely necessary to add, that it is not essential that the testator should be seized of a legal estate at the time when the will is made. If he has an equitable estate merely, it is governed by precisely the same rules as if it was purely legal. (Langford v. Pitt, 2 P. Wms. 629 ; Potter v. Potter, 1 Vesey 437.)

If we now ascertain the facts connected with the case, it will be seen that the will was made in 1833; and the lands which were sold under the supposed power contained in the will, were not acquired by the testator until 1835. At the latter period, he purchased them from Kirkpatrick, who executed a bond to make him titles. The testator thus became seized of an equitable estate of inheritance, which, at his death, descended to and vested in his heirs at law.

2. But it is urged that, although the equitable title descended, yet the will contains a power to sell all the estate of the testator; and that this power may attach to the lands, although the lands themselves may not pass by the will. This position has frequently been overruled in England; and we are not aware that the correctness of the rule there established has ever been questioned. [Langford v. Eyre, 1 P. Wms. 72; Wagstaff v. Wagstaff, 2 P. Wms. 258; Jones v. Clough, 2 Vesey, 366.]

3. The subsequent attempt to invest the complainant with the legal title, can have no effect to make him chargeable on the contract, because it is evident that he would be considered as a purchaser, with notice of the equitable title vested in the heirs at law of the deceased Meador. Such of them as are minors, could contest the complainant's right to the land after they became of age; and consequently it would be unjust to compel him to receive a title which may be disputed.

Our conclusion then is this: that as the lands were acquired by the testator in 1835, the will executed in 1833 was inoperative, either to pass the lands, or to subject them to the operation of a power; that the title of the testator to these lands descended to his heirs at law, in whom it yet remains; and that the sale by the defendants, although made in the utmost good faith, cannot have the effect to pass any title to the complainant, and that he is not required to receive that which is tendered to him on payment of his note.

We are satisfied that the decree of the Chancellor, so far as the merits of the case are concerned, is free from error.

It is unimportant to consider the effect of the exception to the depositions, because, in our view, they are laid aside entirely, inasmuch as the whole equity of the bill is admitted by the answers.

In relation to the point, that the complainant had an ample and complete defence at law, we think the circumstance that the bond to make titles, which was executed by one of the defendants, withdraws this case from the influence of the decision made in *Wiley v. White*, 2 S. & P. 355; and we are not therefore called on to decide, whether the circumstances of this case did not of themselves require the complainant to go into chancery to obtain a rescission of the contract.

Let the decree of the Chancellor be affirmed.

LAZARUS USE &C. v. SHEARER.

1. In order to make a written contract made by an agent, binding on the principal *per se*, it should appear to have been made in the name of the latter; but the form of the signature is unimportant.
2. When it is doubtful from the face of a contract, whether it was intended to operate as the personal engagement of the party signing it, or to impose an obligation upon some third person as his principal, parol evidence is admissible to show the true character of the transaction; the more especially, if the right of a *bona fide* indorser without notice is not concerned.
3. An authority to the President of a corporation "to make all contracts, and draw on the Treasurer for all disbursements (countersigned by the Secretary) under the direction of the board" does not authorize him to accept a bill without "the direction of the board."
4. Where the acts of one person as the agent of another, are ratified by the principal as being done for him, it will be presumed that the agent acted under a legal authority.
5. Although the principal becomes liable by the adoption of a contract made on his behalf, the agent is not discharged, unless he show, that the act was done in the exercise, and within the limits of the powers delegated, or in other words, under a sufficient authority existing at the time the contract was made.
6. Where an agent makes a contract in writing, on which he is *prima facie* liable, he may be sued thereon; and it is not necessary to bring a special action on the case against him for having exceeded his authority.
7. A plea which denies that the writing declared on, is the defendant's act *in law*, or insists that it was not intended to impose any legal obligation or duty upon him, must be verified by affidavit: *aliter*, where a mere legal question is raised upon an inspection of the paper, whether the defendant is personally responsible

Writ of error to the County of Dallas.

THE plaintiff declared against the defendant in *assumpsit* as the acceptor of a bill of exchange of the following tenor, viz :
“Dollars 1276 89. MOBILE, 24th April, 1838.

On the first day of January, 1839, of this my first of exchange, second of the same tenor and date unpaid, pay Henry Lazarus or bearer twelve hundred and seventy-six eighty-nine one-hundredths dollars, for value received, negotiable and payable at the Bank of Mobile.

ANDREW ALFRED DEXTER,
Ch’f Eng’n’r S. & T. R. R. Co.

To GILBERT SHEARER, Pres’t. of the Selma and Tennessee Railroad Company.”

The defendant demurred to the declaration. and his demurrer being overruled, he pleaded *non assumpsit*, and the cause was thereupon submitted to the jury. On the trial the plaintiff excepted to the ruling of the Court.

The plaintiff having offered in evidence the bill of exchange, with the acceptance thereon written, the defendant proposed to prove by the drawer, that the bill was drawn by him on the defendant as President of the Selma and Tennessee Railroad Company, for a debt which the company owed the drawer; and that the payee of the bill at the time the same was drawn was fully apprized by the drawer, that it was intended to be drawn upon the defendant as President of the company, and not in his private capacity. To the admission of this testimony, the plaintiff objected; but the Court overruled his objection, and the evidence was permitted to be given to the jury; and thereupon he excepted.

The defendant then proved, that some days after the bill was drawn, he accepted it as shown upon the face of the bill, in the presence of the Treasurer of the company, who charged the amount of the same on the books of the company, to the drawer, but that neither the payee nor his agent was then present. He also gave in evidence the act of the legislature, passed the 22d December, 1836, “to incorporate the Selma and Tennessee Railroad Company,” together with so much of the by-laws of the company, as related to the power of the President to make contracts, to draw or accept bills of exchange. The only by-law on the subject is in the following words, “it

shall be the duty of the President to preside at all meetings of the board of directors, to carry on all correspondence on the business of the company, to make all contracts, and draw on the Treasurer for all disbursements (countersigned by the Secretary) under the direction of the board." The defendant was not present when the bill was drawn; and it was proved by the drawer, that this was the only bill he ever knew the defendant to accept for the company; that he did not know of any resolve of the company to authorize him to accept this, or any other bill: but he knew that after its acceptance it was recognized by the board of directors as a debt of the company.

The plaintiff asked the Court to charge the jury that, to make the acceptance of the defendant the act of the company, so as to relieve him from personal liability, he must shew that he had authority by a resolve, or some act of the board of directors, or by the by-laws, or act of incorporation, at the time he accepted the bill to make the acceptance. Which charge the Court refused to give; but charged the jury, that it was immaterial whether the defendant was invested with an authority to accept the bill in the manner deemed necessary by the plaintiff—if it appeared he was acting in a public capacity, he was not personally liable in this action: and as the plaintiff agreed to take the bill on the responsibility of the company, he could not object, that Shearer was not acting in his official capacity. Whether the defendant had authority to accept the bill was a question between himself and the company, and not between himself and the plaintiff, unless his authority was denied by the company. To which refusal, to charge as prayed, and to the charge as given, the plaintiff excepted.

The plaintiff then requested the Court to charge the jury, that the subsequent ratification of the acceptance by the board of directors, would not change the liability to pay the bill from the defendant to the company, unless the plaintiff consented thereto. Which charge the Court refused to give, but charged the jury, that if the plaintiff took the bill, with the understanding, that it was drawn on the company and not on the defendant individually, the plaintiff could not object to the want of authority, if the jury considered from the evidence, that the defendant accepted it as President of the company—that

the plaintiff cannot insist on the want of authority, if the company did not dissent from the act of the defendant. To the refusal to charge as prayed, and to the charge as given, the plaintiff excepted.

The Court further charged the jury, that if the plaintiff took the bill, with the understanding that it was drawn on the defendant as President of the company, and it was accepted by him in that capacity, although the President was not the officer generally authorized by the company to accept bills for it, yet if he did so accept, and the company ratified the act, the plaintiff could not complain of his want of authority, and in the absence of fraud, charge him individually.

The Court further charged the jury, that they might infer from the subsequent ratification of the act by the company, that the act had been authorized by it.

A verdict and judgment was rendered in favor of the defendant, and the plaintiff has prosecuted a writ of error to this Court.

CLARKE, for the plaintiff, insisted 1. That the acceptance was by the defendant personally, and not for the company. Those only are to be regarded as parties to a bill, whose names appear upon it, written either by themselves or some one by their authority. [3 D. & E. Rep. 761; 11 Mass. Rep. 97; 6 Binney's Rep. 228; 10 Wend. Rep. 271; 2 Camp. Rep. 308; 14 Maine Rep. 180.] The agent who signs an instrument must show by the act of signing, that he represents another, or he will be personally liable. [Chit. on Bills, Am. ed. of 1839, 321; Combe' case 9, Cokes' Rep; 5 Law Lib. 77; 2 Str. Rep. 705; 2 Ld. Raym. 1418; 6 D. & E. Rep. 176; 2 East Rep. 142; 5 M. & S. Rep. 345; 5 B. & A. Rep. 3; 7 Sergt. & Lowb. Rep. 13; 11 Mass. Rep. 27, 54; 13 Johns. Rep. 307; 1 Marsh. Rep. 545; 9 Porter's Rep. 305.] The words and letters which follow the defendant's name both in the address and in the acceptance of the bill, must be regarded as a *descriptio personæ*. (5 Mass. Rep. 299; 6 Mass. Rep. 58; 8 Mass. Rep. 103; 9 Johns. Rep. 334; 8 Cowen's Rep. 31; 1 Yeates' Rep. 39; 2 Wheat. Rep. 56; 2 Str. Rep. 955; Cases Temp. Ld. Hardwicke, 1.)

2d. The declaration charged the defendant as acceptor, and to authorize him to shew that he acted on behalf of the company, his plea should have been verified by affidavit.

3d. But even if the plea had been thus verified, evidence to show the circumstances under which the acceptance was made, would be inadmissible ; because it would alter or explain the written contract of the parties. (Chitty on Bills; 164, 11 Mass. Rep. 27 ; 2 Porter, 308 ; 1 Stewt. Rep. 425 ; Minor's Rep. 365 ; 1 Com. Dig. 776, note ; Story on Agency, 288.) The knowledge of the payee of the bill, that the defendant was acting for the company, cannot change the rule in this particular. (11 Mass. Rep. 54 ; 5 Taunt. Rep. 749 ; 14 Maine Rep. 180 ; Story on Agency, 147.)

4th. The subsequent ratification of the defendant's acceptance by the company, if he acted without authority, cannot affect the plaintiff. (8 Wend. Rep. 494 ; Arfridson v. Ladd, 12 Mass. Rep. 173.)

5th. The County Court certainly mistook the law in referring the construction of the written contract to the jury.

EDWARDS, for the defendant, argued, that it was allowable to show by extrinsic proof, that Shearer accepted the bill for the company, and not on his individual account. (1 Phil. Ev. C. & H. ed. 561 ; 3 *ibid*, 1464 ; 1 Cow. Rep. 513 ; 5 Wheat. Rep. 326 ; 15 Johns. Rep. 1 ; Story on Agency, 288 ; *ibid* 146, note ; 17 Wend. Rep. 40 ; 1 Ala. Rep. N. S. 575 ; 11 Mass. Rep. 97.) Nor was it necessary that the defendant's plea should have been verified by affidavit. (Aik. Dig. 283.)

The bill of exceptions is confessedly imperfect, and in some respects inconsistent, yet the entire bill should be considered together; and when thus construed, the judgment of the County Court may be sustained. (11 Mass. Rep. 97 ; Story on Agency, 286.)

Again: if Shearer acted without authority, and no liability was imposed upon the company, he cannot be made liable in this form of action : but the proper remedy against him would be a special action on the case. [11 Mass. Rep. 97 ; 16 Mass. Rep. 462 ; 11 Serg. & R. Rep. 129.]

COLLIER, C. J.—The formality once required in the execution of written contracts, made through the medium of agents is now to a great extent dispensed with. It is however necessary, in order to make it binding upon the principal, *per se*, that it should appear to have been made in his name. The form of the signature is unimportant, it may be either “A. B. by C. D.” or “C. D. for A. B.” [Stringfellow & Hobson v. Mariott, 1 Alabama Rep. N. S. 573.] But a mere addition to the name of the party signing a contract, cannot be regarded as a certain *indicium*, that it was made on the behalf and account of another. Thus in Allen v. Brockway and others, 17 Wend. Rep. 40, a promissory note in usual form, was made for the payment of two hundred and sixty dollars to the plaintiff. The names of the defendants were subscribed thereto, with the description of “Trustees of Baptist Society” &c. added: It was held that the defendants were *prima facie* personally liable, and the addition was a mere *descriptio personarum*. (See also Hills v. Bannister & Butler, 8 Cow. Rep. 31.)

Where however it is doubtful from the face of the contract, whether it was intended to operate as the personal engagement of the party signing it, or to impose an obligation upon some third person as his principal, parol evidence is admissible to show the true character of the transaction. The Mechanic's Bank of Alexandria v. The Bank of Washington, 5 Wheaton's Rep. 326, is illustrative of this principle. That was an action brought on a check of the following tenor:

“No. 18. Mechanics Bank of Alexandria, June 25th, 1817
—Cashier of the Bank of Columbia—pay to the order of P. H. Minor, Esq. ten thousand dollars.

\$10,000

WM. PATTON, Jr.”

On the part of the plaintiff in error, it was insisted that the check not appearing to have been drawn by Wm. Patton in his official character of cashier, parol evidence was inadmissible to show, that the amount paid on it was understood by the parties to be for the benefit of the Mechanics' Bank, &c. But the Court thought it by no means certain that this appeared on its face to be a private check. “on the contrary the appearance of the corporate name of the institution on the face of the paper, at once leads to the belief that it is a corporate, and not

an individual transaction: to which must be added the circumstances, that the cashier is the drawer and the teller the payee; and the form of ordinary checks deviated from, by the substitution of *to order* for *to bearer*. But it is enough for the purpose of the defendant to establish, that there existed on the face of the paper, circumstances from which it might reasonably be inferred, that it was either one or the other. In that case it became indispensable to resort to extrinsic evidence to remove the doubt." So in the case of *Brockway v. Allen*, et al. already cited, the defendants made a promissory note, adding to their signature "Trustees of the first Baptist society of the village of Brockport." It was held that, although they were *prima facie*, liable personally; yet such presumption of liability might be rebutted by proof, that the note was in fact given by the makers, as the agents of the corporation, indicated by their signature; for a debt due by the corporation to the payee, and that they were authorized to make the same as such agents; and that these facts being known to the payee at the time he received the note, would relieve the defendants from personal responsibility. Such evidence would not however, we apprehend, be admissible against a *bona fide* indorsee of negotiable paper without notice, acquired in the ordinary course of trade.

An inspection of the bill in the case at bar, affords proof quite as satisfactory as that shown in the cases cited, that the plaintiff in accepting it, did not intend to take upon himself a personal liability; but that he acted officially as the representative of the "Railroad Company." If then, the question was, whether proof in explanation of the transaction, and to remove the doubt were admissible, we should not hesitate to answer it affirmatively. But there are other questions to be considered, viz: was the defendant authorized at the time of his acceptance, to accept bills for the company, and if not, can the ratification of the act by the company exempt him from responsibility, according to the terms of the contract?

In respect to the first question, it has not, nor indeed could it be insisted, that the evidence adduced at the trial shows an authority to the defendant to accept bills for the corporation. He was authorized "to make all contracts, and draw on the

Treasurer for all disbursements (countersigned by the Secretary) under the direction of the board"; but this did not confer on him the power to make contracts for, or otherwise bind, the corporation, without the "direction of the board" of directors.

Where the acts of one person, as the agent of another, are recognized and ratified by the principal as being done for him, it will be presumed that the agent acted under a legal authority; and under such circumstances, it will be competent for the party contracted with, to look to the principal to make good any breach of the agreement. But although the principal becomes liable by the adoption of the contract, it by no means follows, that the agent himself is discharged from responsibility. If the agent would discharge himself, he must show—1. That the act was done in the exercise; and 2. Within the limits of the powers delegated, or in other words, under a sufficient authority existing *at the time* the contract was made. In *Rossiter v. Rossiter*, 8 Wend. Rep. 494, this precise question arose. There the defendant attempted to show in defence, that he had made the note in question for one Pinchon, who had adopted the act. The Court said: "It was contended on the part of the defendant, that Pinchon had recognized the acts of the defendant subsequently, and thereby his liability on the note was established, even if the authority by the letter of attorney were doubtful; but I apprehend the true question is, whether the defendant had at the time, authority to sign the note, and thereby obligate Pinchon to its payment. The note when executed, was either the note of one or the other: if it was the note of Pinchon, then the defendant was not liable; if it was not the note of Pinchon, then it was the defendant's note." [To the same effect is *Arfridson v. Ladd*, 12 Mass. Rep. 173.]

Where one undertakes to represent another, and in that character makes a contract, without or not within the limits of a legal authority, he renders himself personally responsible. This being a well established principle, reason concurs with the law in maintaining, that the responsibility thus incurred, shall not be discharged, and the party contracted with, forced to look to another person against his consent.

But it is argued for the defendant, that although he may be

liable to the plaintiff, yet he cannot be charged in an action upon his acceptance; but a special action on the case for having exceeded his authority, is the proper remedy. If the acceptance had been made in the name of the corporation, the argument would be entitled to great consideration; but such is not the case. The acceptance, we have seen, *prima facie*, is the personal engagement of the defendant to pay the bill—it is one on which he is suable; and if he fail to show that he made it in his official character, in virtue of an authority for that purpose, the plaintiff is entitled to judgment.

As it will follow from the view we have taken of this cause, that it must be sent back for another trial, it may be well to express our opinion upon the argument of the plaintiff's counsel, that the evidence in explanation of the transaction was inadmissible under the issue, because the defendant's plea was not verified by affidavit. By the 3d section of the act of 1811, "regulating judicial proceedings in certain cases, and for other purposes," it is enacted, that it shall not be lawful for the defendant in any suit, "to deny the execution" of any writing, the foundation of an action; unless it be by plea supported by affidavit. [Aik. Dig. S. 137, p. 283.] The evidence adduced by the defendant does not deny, that the acceptance was made by him; it supposes in fact, that it was made with his hands, but upon the account of the corporation he professed to represent. According to the strict import of language, then, the evidence does not deny the execution of the writing sued on; yet, its tendency is a direct denial of the act. The declaration charges, that the bill was accepted by the defendant, and by the evidence, the defendant seeks to show, that the acceptance though, with his hand, is not obligatory upon him. Now the statute cannot be literally interpreted, or it would fall short of effecting the purpose proposed by the legislature. We understand the meaning of the act to be, that a plea which denies, that the writing declared on, is the defendant's act *in law*, or in other words, insists that it was not intended to impose a legal obligation, or duty upon him, comes within the spirit and intention of the act, and must be verified by affidavit. The defence in the present case, is of that character, and therefore, cannot be made under the plea in the record. [Fowlkes & Co. v. Baldwin, Kent & Co., at this term.]

If it were a mere legal question, upon an inspection of the paper, whether the defendant was personally responsible, then the plea would have been regular, though not accompanied with an affidavit.

This view disposes of the case, and we have only to say, that the judgment must be reversed and the cause remanded.

GLOVER v. RAINEY.

1. When the bill in a Chancery cause is lost or abstracted from the files, another may be substituted, but if this is not done, no decree can be rendered in favor of the complainant, but the suit must be dismissed.

THIS was a bill in Chancery, filed by the defendant in error, against the plaintiff in error.

The bill having been lost or abstracted from the files, a motion was made by the defendant, that the cause be dismissed for want of prosecution, which motion the Court refused; and at a subsequent term of the Court decreed, that a report, which had been made in the cause, "be confirmed; that defendant pay to complainant the sums ascertained against him, for which he may have execution; and that the receiver pay over to complainant the sum reported to be in his hands, and that defendant pay the costs of this suit.

From this decree the defendant prosecutes a writ of error to this Court.

J. L. MARTIN, for plaintiff in error.

ELLIS, contra.

ORMOND, J.—In *Dozier v. Joyce*, 8 Porter, 303, and in *Williams v. Powell*, 9 Porter, 493, this Court laid down the rules for the substitution of lost papers from the files, and that this right existed as well after as before judgment; and could be done pending a writ of error. In this case, the bill is lost or

has been abstracted from the file of papers in the cause, and no attempt has been made or offer to supply its place; indeed the counsel for the defendant in error, admits his inability to do so.

In this aspect of the case, it is impossible to sustain the decree; without the bill it is impossible to know, with any approach to certainty, what the nature of the claim asserted against the defendant is; and without knowledge on this head, how can it be ascertained whether the report of the Master, made as it must have been, if correctly made, on proof of the allegations of the bill, is correct or not. It is true, it may be conjectured what the allegations were from the answer, and other facts of the cause; but any decision, based on such data, would be deficient in that certainty, which is necessary in all judicial proceedings.

The decree is, therefore, reversed and the bill dismissed; but without prejudice to any suit, which the defendant in error, may think proper to institute.

THE GOVERNOR FOR USE OF SIMMONS v. HANCOCK & HARRIS.

1. The sureties of a sheriff are not liable for a malfeasance of the sheriff, unless the act complained of, includes an omission to perform some duty imposed by law.

Writ of Error to the County Court of Sumter County.

ACTION of debt on a sheriff's bond against the defendants, who signed the same as sureties for William Johnson. The bond is conditioned, that Johnson, as sheriff of Sumter County, shall well and truly pay over all monies received by him, and otherwise faithfully discharge all the duties, which are or may be required of him by law, during the time for which he is appointed.

The declaration sets out the bond and its condition, and the breaches assigned are substantially these: That an attachment

was issued at the suit of Anne Simmons against the estate of Jackson Brewer, to secure a debt of fourteen hundred dollars. This attachment was levied on a negro woman and child, of the alledged value of two thousand dollars. That Johnson, after the levy and before the return of the said attachment, falsely and fraudulently represented to Mrs. Simmons, that the said Brewer had removed all his property from the County; and that the said attachment had not been nor could be levied. That these false representations were made to induce Mrs. Simmons to sell her claim against Brewer to the said Johnson, for the sum of one hundred dollars; and that she did sell the claim to him in consequence of the said representations, for the sum named. A similar breach is alledged, except that she was induced to sell the claim to the said Johnson and one Cleveland. Another breach is assigned by alledging that Johnson, with a view to induce Mrs. Simmons to dismiss her attachment, after its levy and before its return, fraudulently connived at, assented to, and permitted a great fraud to be practised, and divers misrepresentations to be fraudulently and wickedly made; and that in consequence, she did dismiss her said suit against Brewer, and thereby entirely lost the benefit and advantage of it.

The defendants demurred to the declaration; and judgment was thereon rendered in plaintiff's favor.

The plaintiff prosecutes this writ of error, and assigns, that the County Court erred in its judgment on the demurrer.

SMITH, for the plaintiff in error insisted, that the bond of a sheriff is forfeited by any misfeasance or malfeasance in his official duties. He is not permitted to use the process of the Courts in making unequal bargains or taking undue advantage. [Jenner v. Joliff, 9 Johns. 380; Reed v. Prayer, 7 Johns. 426; Bartlett v. Cruger, 15 Johns. 250.]

As to the right, in the first instance, to sue on the bond, he relied on Searcy v. Fearne, 6 Por. 400; Governor, use, &c. v. White, 4 S. & P. 441.

JONES, contra.

GOLDTHWAITE, J.—The question here is not whether the sheriff is personally liable to respond in damages for the acts complained of; but it is whether such acts are within the condition of his official bond. In our opinion, they do not constitute a breach of the condition. We will not say that the sureties of a sheriff are not liable in some cases of malfeasance; but in such, we think the malfeasance must include a misfeasance also; as, for instance, if the sheriff should wantonly destroy property levied by him, this would be a tortious act, but there would likewise, be a tortious omission of his duty, which is to keep the property safely. It does not appear from this declaration, that the sheriff has omitted any part of his duties. The plaintiff, in interest may have been injured by his wrongful and fraudulent misrepresentations, but the sureties do not stipulate to be answerable in such a case

The judgment must be affirmed.

JONES v. DAVIS.

1. Whilst an execution issued from the Circuit Court was in the sheriff's hands, a judgment was obtained against the defendant, and his property levied on and sold by a constable, under an execution issued thereon—held, that the lien created by the delivery of the execution to the sheriff was, under the act of 1828, divested by the levy of the constable.
2. Where a sheriff or other officer in the absence of fraud on the part of the purchaser, sells more property than is necessary to satisfy an execution, the sale, as to the excess is not absolutely void; though under *some circumstances*, it may be set aside.
3. Where an officer is guilty of a breach of good faith in making an excessive levy, or sale under execution, he is liable to an action by the defendant in execution; and perhaps, a party who has been prevented from obtaining satisfaction of a judgment in his favor, may maintain an action against him.
4. Where proceedings before a justice of the peace are evidence in a cause, it is not necessary to produce the original papers, but sworn copies compared by any competent person to whom the justice will intrust the originals for that purpose, are admissible.
5. If a charge to the jury is too broad abstractedly considered, the revising Court will refer to the prayer, in answer to which, it was given, and the evidence in the cause to ascertain if it be objectionable.

THIS was a proceeding under the statute, in the Circuit Court of Tuscaloosa, to try the right to some cotton, which was levied on by a writ of *feri facias*, issued from that Court, at the suit of the plaintiff, against the goods and chattels, &c., of William Carroll. The cotton was claimed by the defendant in error, and an issue made up and submitted to the jury for the trial of the question, whether the property was liable to the plaintiff's execution.

On the trial the plaintiff excepted to the ruling of the presiding Judge, and her exceptions are now certified to this Court as part of the record. It appears that the plaintiff's execution was delivered to the sheriff on the 2d October, 1840, and on the 23d. February, 1841, was levied on one thousand eight hundred and ninety pounds of ginned cotton, the property in dispute, being the crop of the defendant in execution for the year 1840.

The defendant in error offered as evidence two papers purporting to be executions issued by a justice of the peace, in his favor, against Carroll, both dated 27th January, 1841. One professing to be founded on a judgment of the 9th of that month, and the other on a judgment of the 21st,—the first for thirty-four and fifty-nine one hundredths dollars, besides one and thirty-one and one-fourth one hundredths dollars costs, the latter for forty-nine and fifty-nine one hundredths dollars, besides one and thirty-one and one-fourth one hundredths dollars costs. He then proposed to prove by the constable levying these executions, that they were genuine; whereupon, the plaintiff objected to the admission of the executions, unless the judgments on which they were founded were first produced; but her objection was overruled, and thereupon she excepted.

The defendant then proposed to read to the jury, a paper purporting to be a transcript, from the docket of the justice of the peace, who rendered the judgment, showing that the warrants in both cases, issued on the 9th of January, 1841, and, were returnable on the 21st of that month, and that judgments were then confessed by Carroll for the amount stated in the executions. The constable levying the executions stated, that he had compared the paper offered with the justice's docket,

and that the same was a correct transcript. To the introduction of this evidence the plaintiff also objected; but her objection was overruled, and thereupon she excepted.

It was proved, that the levies by the constable were made on the 29th January, 1841, on "the rise of seven thousand pounds of seed cotton," (the same now in controversy,) and being duly advertised, was sold to the defendant, "at two dollars and some cents per hundred;" all of which proceedings before the justice and by the constable, took place while the plaintiff's execution was in the sheriff's hands. Evidence was offered to show a fraudulent combination between the defendant and Carroll; but evidence to repel the charge was offered by the defendant.

The Court charged the jury, that although, all the proceedings before the justice and by the constable, took place while the plaintiff's execution was in the sheriff's hands; yet, if the levy and sale of the constable was made before the levy of the sheriff, under the statute of 1828, it divested the lien created by the delivery of the plaintiff's execution to the sheriff.

The Court was asked to charge the jury that, if more cotton was sold by the constable, than was sufficient to satisfy the executions in his hands, the overplus was sold without authority, and was liable to the plaintiff's execution. The Court refused so to charge; but charged the jury, the purchaser at the constable's sale was not bound to inquire into the extent of his authority, and that he acquired a good title to all the cotton he purchased at the sale.

To the refusals to charge the jury and to the charges given, the plaintiff excepted, and a verdict and judgment being rendered against her, she has prosecuted a writ of error to this Court.

MOODY, for the plaintiff.

MARTIN, contra.

COLLIER, C. J.—The questions presented by the assignment of errors, arise upon the bill of exceptions. It is insisted:

1. The lien created by the delivery of the plaintiff's execu-

tion to the sheriff, could not be defeated by the subsequent levy of the executions issued by the justice of the peace.

2. That the excess of cotton beyond what was necessary to satisfy the executions, at the suit of the defendant, was sold without the authority of law, and should be condemned to the satisfaction of the plaintiff's execution.

3. The executions issued by the justice of the peace, were inadmissible evidence in themselves.

4. The examined copies of the proceedings before the justice, though verified by the oath of a witness, were not sufficiently authenticated to make them evidence.

First. The decision of this point must depend upon the construction of the first section of the act of 1828, "relative to the satisfaction of executions." That section enacts, that executions issued by a justice of the peace, shall operate as a lien on the property of the defendant, from the time of the levy and not sooner; and that the lien so created by the levy of an execution by a constable, shall not be overreached by the levy of any execution in the hands of the sheriff, not previously levied. [Aik. Dig. 166.]

It is argued for the plaintiff, notwithstanding the directness of the terms of the act cited, that as a lien attached in virtue of her execution, it must continue to operate until the execution lost its vitality, that the legislature cannot be supposed to have intended to take from an execution a lien, which they had previously declared should follow it, where the party entitled, was in no default. To sustain this argument, the case of *Harrison v. Marshall*, 6 Por. Rep. 65, has been cited. In that case it appears, that a lien had attached upon a *fieri facias*, issuing from the Circuit Court in November, 1827, and the levy was made by the constable in May, 1828—after the passage of the act cited. The Court considered, that the right of the plaintiff having previously vested to have his execution satisfied from the property against which it issued, was not intended to be interfered with, by the act of 1828. This case then, does not decide the question which the plaintiff has supposed.

The language employed by the legislature seems to us to be so direct as not to admit of controversy. It explicitly declares

that the levy of an execution by a constable shall not be overreached by the lien of any execution in the hands of the sheriff not previously levied. The case stated in the bill of exceptions, is that which is provided for, and the instruction of the Circuit Judge to the jury, is but the mere echo of the statute.

Second. It is the duty of a sheriff or other officer, to sell no more property than is necessary to satisfy the execution with costs, where the property levied on, is susceptible of division. In *Tiernan v. Wilson*, 6 Johns. Ch. Rep. 414, Chancellor Kent says, The proposition is not to be disputed, that a sheriff ought not to sell at one time, more of the defendant's property than a sound judgment would dictate to be sufficient to satisfy the demand, provided the part selected can be conveniently and reasonably detached from the residue of the property, and sold separately. To the same effect, see 8 Johns. Rep. 333; 18 Johns. Rep. 362, and *Woods v. Monell*, 1 Johns. Ch. Rep. 502, and in *Wheeler & McCurdy v. Kennedy*, 1 Alabama Rep. N. S. 292, this Court held a similar doctrine.

But if an officer abuses his trust in this respect, the sale is not in the absence of fraud on the part of the purchaser, absolutely void as to the excess of the property sold. True, under some circumstances, it may be set aside upon motion to the Court, or by suit in equity; but until this is done, the title of the honest purchaser must be respected. (*The Mobile Cotton Press, &c. v. Moore & Magee*, 9 Porter's Rep. 679; 1 Johns. Ch. Rep. 502; 6 Johns. Ch. Rep. 411.]

In Kentucky it has been held, that where more land has been sold than was necessary to satisfy the execution, in the absence of all circumstances to justify it, the sale was void. (*Patterson v. Carneal's heirs*, 3 Marsh. Rep. 619; *Pepper v. The Commonwealth*, for, &c., 6 Mon. Rep. 27. But these cases depend upon a statute of that State, regulating the sale of lands under execution. (*Addison et al. v. Crow et al.*, 5 Dana. Rep. 277.]

Where an officer is guilty of a breach of good faith in making an excessive levy, or sale under execution, he is liable in damages to the defendant in execution; and we will not say that a party, who has been thereby prevented from obtaining satisfaction of a *fieri facias*, in his favor, may not main-

tain an action against him. That question does not here arise.

Third and Fourth. These questions may be considered together. If the defendant was a plaintiff upon the trial of the right, seeking to condemn property levied on, to the satisfaction of his executions, there can be no doubt that the executions would be admissible evidence in the absence of the judgments. That point was determined in *Carlton et al. v. King*, 1 Stewt. & P. Rep. 472, where executions issued by a justice of the peace had been levied on property claimed by a third person.

If the executions offered by the defendant were inadmissible in themselves, (a question which need not be now decided,) their admission was legalized by the copies of the proceedings before the justice of the peace. The original papers of the justice could not have been required; nor was it necessary that he should have attended himself as a witness to vouch the genuineness of the copies. Sworn copies of such papers are clearly admissible, and these copies may be made and compared by any competent person, to whom the justice will intrust the original for that purpose. [*Hamner v. Eddins*, 3 Stewt. Rep. 192.)

The suggestion in argument, as to fraud between the defendant and the constable, who levied his executions, does not arise upon the record. All questions of that kind, were closed by the verdict of the jury.

It is supposed, that in the last charge given, the Circuit Judge decided a question of fact, which appropriately pertained to the jury. That charge was evidently intended, as a response to the prayer of the plaintiff. In assuming, that the defendant acquired a good title to all the cotton he purchased at the sale, the Court merely intended to say, that the executions were a sufficient authority for the constable to sell all the cotton, and that the defendant's purchase invested him with a title to all as against the plaintiff.

In every view in which the case has been presented there, is no error, and the judgment of the Circuit Court is, consequently, affirmed.

PEARSON v. MITCHELL.

1. An indorsee of a note instituted suit against the maker to the County Court of the county in which he resided, and which was the first court after the maturity of the note, which writ was returned *not found*, whereupon he dismissed the suit and commenced anew to the next court held for the county, which was the Circuit Court; obtained judgment and return by the Sheriff of no property found—Held that in a suit by the endorsee against the endorser a declaration alledging these facts was good.

Error to the Circuit Court of Marengo.

THIS was an action of assumpsit in the court below by the plaintiff in error as assignee against the defendant, as assignor of a promissory note. The note fell due 1st January, 1837. The plaintiff sued out a writ against the maker returnable to the February term of the County Court of Marengo, that being the county in which he resided, and the first court to which suit could be brought. The writ being returned not found, the plaintiff did not sue out an alias, but dismissed the suit and commenced a suit returnable to the March term, 1837, of Marengo Circuit Court, upon which judgment was obtained; and to an execution issued thereon the sheriff made return of no property found. To the declaration, which alledges these facts, the defendant demurred and the court sustained the demurrer, and rendered judgment for the defendant, from which this writ of error is prosecuted. The error assigned is the judgment of the court on the demurrer.

MURPHY AND JONES for plaintiff in error, cited Aik. Dig. 328, 30; 3, Littell Rep. 132; 2, Porter 456; 5th Stew. and Porter 96.

PECK, contra.

ORMOND J.—The judgment of the court below is defended in this court on the ground that the 12th and 16th sections of the law by which this proceeding is governed, Aik. Dig. 329, 30, must be considered together; and that considered in con-

nection it is plain that the Legislature intended that the suit which was required to be brought *to the first court to which suit can be brought*, should be prosecuted to a return of "no property found."

In this case a suit was brought to the proper court, and at the proper time, and the writ being returned *non est*, the plaintiff dismissed the suit and commenced anew to the next court to be held in the county; the first suit being brought to the county and the latter to the Circuit Court. This we think sufficient not only upon a fair interpretation of the statute considering its scope and design and the mischiefs intended to be prevented, but that the case is brought within its literal interpretation. Here is a suit brought to the first court to which suit could be brought, and without any delay a judgement is obtained against the maker of the note and a return of "no property found." It is true the judgment is not obtained on the writ first sued out; nor does the statute require it, such a construction of the statute would leave a party remediless when he was obliged to submit to a nonsuit; or when a judgment was obtained on demurrer. Such could not have been the intention of the Legislature. When the writ in this case was returned "*non est*," there was no obligation on the plaintiff to sue out an alias writ; all that the statute required of him was to continue his pursuit of the maker without delay; and this would be as certainly accomplished by commencing anew in the same court as by suing out an alias writ. This being the case what possible objection can there be to commencing anew in a court, where as the return would be sooner made, the judgment would be obtained sooner.

The plain design of the statute was in cases not commercial, to simplify the remedy against endorsers and to substitute for demand and notice a speedy pursuit of the maker to judgement and a return by the sheriff of no property found, which the statute makes evidence of his inability to pay. To accomplish the object in view by its enactment it has always received in this court a liberal interpretation. Thus it has been held that, when from the absence of the maker from the state, he cannot be sued here, that the suit required to be brought as the condition of the liability of the endorser may be dispensed

with, and that the assignee is not bound to sue out of this State. [See *Roberts v. Kilpatrick*, 5 Stew. and Por. 96 ; *Woodcock v. Campbell*. 2 Porter, 456.]

In the present case, as before observed, the statute has been literally complied with, by bringing suit against the maker, to the first term to which suit could be brought, and a pursuit without delay to judgment, and the return of the sheriff required by law. That a new suit was commenced, instead of continuing the first ineffectual writ, is not objectionable. The statute does not in terms require the first ineffectual writ to be prosecuted. But as its whole scope and design requires a vigilant pursuit of the maker, any unnecessary delay in commencing another suit, or in prosecuting the first, would doubtless discharge the endorser. Such has not been the case here, but on the contrary, extraordinary diligence, a diligence beyond the exactions of the statute, has been employed.

It follows from what has been said, that the judgment of the Court below, sustaining the demurrer to the declaration, is erroneous, and it is therefore reversed, and the cause remanded for further proceedings.

BIERNE & McMAHON v. THE STEAM BOAT TRIUMPH

1. The omission to issue or serve a writ of monition, in a suit commenced to enforce a lien against a Steam Boat, is not a sufficient cause, according to the course of admiralty practice, to dismiss the libel.
2. Where no monition is issued; or if one is issued, and its service is irregular or defective, it is entirely competent for the Court to make such order as will effectually protect the interests of those who are not before it.
3. In the absence of any rules of Court directing the practice, it is probable that the mere taking of the Steam Boat into the possession of the executive officer of the Court ought to be considered as notice to all the world; as the jurisdiction over the Boat commences with its seizure.
4. When a bond is taken by the sheriff, conditioned to detain the Steam Boat seized, if judgment of condemnation shall be given and execution issue, this is not a compliance with the statute; nor is the lien upon the Boat discharged. The Court may, notwithstanding, proceed to condemnation of the Boat, and order its sale.

Appeal from the Circuit Court of Sumter County, in a proceeding in the nature of admiralty.

LIBEL to enforce a lien on a Steam Boat under the act of 1836. [Aik. Dig., 2 Ed. 604.]

The libel was filed on the 20th February, 1838, and prays the condemnation of the Steam Boat for the value of certain goods shipped and not delivered.

A writ of seizure issued on the same day, and in this writ is the following clause :

“Whereof, you will given due monition to the claimants of said Steam Boat, &c., and others interested therein.”

The sheriff returned, that he had seized the Steam Boat on the 7th day of March, 1838; and that he had the same to account for; and gave public monition to all concerned by publication and notice in a gazette published in said county.

On the 14th December, 1839, a *dedimus* was sued out at the instance of one who states himself to be the attorney for the defendant, and describing the defendant as the Steam Boat Triumph. The cause was continued from term to term, until October term, 1840, when, on the motion of the plaintiff's attorney, the sheriff was permitted to amend his return by adding to it, that on the application of John Huddleston, claimant of the said Steam boat, her tackle, &c.; the sheriff permitted him to replevy the same out of the sheriff's possession, on his entering into bond, &c., which bond the sheriff returns, &c.

This bond does not pursue the statutory condition; but instead of it, has the following :

“Now, if the said obligors shall, in case judgment shall be rendered at the suit of the said libellants in their said suit, produce to the said sheriff or his successors, at the port of Gainesville, where the said Boat now lies, on demand thereof by the said sheriff, his deputy, or successors having execution thereon against them, then the bond to be void, otherwise, &c.”

This bond is payable to the sheriff, and by him is assigned to the libellants.

At the same term a judgment was entered in these terms: “This day came the said plaintiffs, and also came Steele & Metcalf, attorneys of this Court as *amici curiae*, who at a for-

mer term, entered their names on the margin of the docket of the Court as attorneys on the part of the defence; but who, now disclaim an appearance, and refuse to appear therein, or to interpose any plea on the part of the claimants of the said Boat, or other defendants, whereby the said libellants in their said libel remain wholly undefended; but the Court being unable to ascertain what sum is due, or to determine the allegations of the said libel; it is, therefore, ordered by this Court at the instance of the libellant, that a jury come; and thereupon came a jury, &c., who, &c., upon their oaths do say they find all the allegations of the libel to be proven, and that the libellants are justly entitled to have and recover therein three hundred and eighty-one and thirteen one hundredths dollars; and that they have a lien for the said sum on the said Boat, her tackle, &c." Then follows a judgment of condemnation of the said Boat, to satisfy the said sum; and an order that it be sold by the proper officer.

After the entry of the foregoing judgment, a motion was made by certain attorneys of the Court as *amici curiae*, to set aside the verdict in the case, and to dismiss the libel, on the ground, that there were no claimants before the Court; and because the Court had no jurisdiction over the vessel to render a judgment of condemnation, as no process of monition was issued on the libel.

This notice was not then acted on, but was continued by a special entry of continuance. At the next term, the same attorneys still appearing as *amici curiae*, their notice was sustained, the previous judgment set aside, and the libel dismissed.

From this judgment an appeal to the Supreme Court was claimed, and allowed by the Circuit Court.

It is here assigned, that the Circuit Court erred in sustaining this motion and in setting aside the judgment before rendered; and in dismissing the libel.

BLISS, for the libellants, insisted,

1. That the judgment was regular. The bond which was taken by the sheriff was not that which is authorized by the statute, therefore the lien continued, and could be enforced only by a condemnation and sale of the Boat.

If the claimant had appeared in the Court below and put in a formal claim, this judgment was the only proper one. (Reed v. Martin, 9 Por. 180.)

2. There was a sufficient monition to all parties in interest. The writ of monition is nothing more than a direction to the proper executive officer to give notice, and in this country a clause of monition is usually inserted in the writ of seizure. (Dunlap's Adm. Pract. 137.) The mere seizure is necessarily a notice to all the world; but in this case the notice was ample, and should be considered sufficient; Dunlap's Pract. 141.

3. The appearance made was a warrant of monition. [3 Dallas 87; 9 Wheaton 400; 8 Porter 442.]

4. It was not competent for any one, after judgment to appear as *amici curiae*. The Court will hear any one previous to judgment, but motion to set it aside, ought to be made by a party alone. [Taylor's Glossary 28, note.]

5. In contemplation of law, the Boat is in the custody of the officer seizing it, until the statutory bond is executed. [Livingston v. The Steam Boat Tallapoosa, 9 Porter 111.] Or until a stipulation is permitted by the Court. (4 Cranch 2; 1 Gal. 75, 478; 2 Mason 409; 10 Wheaton 497; 1 Kent's Com. 358.)

6. Admitting the proceedings to have been irregular, the libel ought not for that cause to have been dismissed. Courts of admiralty do not set aside proceedings for informalities, but always require the party to amend. (7 Cranch 389; 1 Wheat. 9: 9 *ibid.* 381, 391; 12 *ibid.* 13; 2 Gallison 526.)

7. The error, if there was any, could not be corrected at a subsequent term. [Dunlap's Practice 671, Neal v. Caldwell, 3 Stew. 134; Wilson v. Torbert, *ibid.* 296.]

STEELE, with whom was JONES, contra, insisted, that the judgment of the Circuit Court was proper, because,

1. There was no monition. A monition is a writ issued by the clerk; although it may be incorporated with the writ of seizure, it must be specific in terms, and prescribe *how* notice is to be given, to affect all persons claiming an interest; it requires the officer to attach a notice to some conspicuous part of the vessel. [9 Cranch. 144; Dunlap's Pract. 137, 141.] It is this writ, and this alone, which gives jurisdiction to the

Court. The return of the sheriff shows what notice was given and it is different from that required by admiralty law.

2. The Boat was released and not in the custody of the Court, therefore, no decree of sale could be given.

3. There is no question but that any Court, on its own mere motion may correct its errors at the same term; and if an order is made, which has the effect to continue the consideration until another term, the judgment is not in such a case to be considered as given; it is suspended until the Court determines, whether it shall be set aside or otherwise.

GOLDTHWAITE, J.—In our opinion the judgment of the Circuit Court, setting aside the previous judgment by default and dismissing the libel cannot be sustained.

The principal argument which has been urged against the regularity of the judgment by default, is, that no writ of monition was ever issued by the clerk. If, in point of fact, a monition had never issued this would not be a sufficient cause to dismiss the libel as the usual course of practice in admiralty Courts, is never to send the party out of Court so long as the proceedings can be made perfect by amendment, whether in form or substance.

The Caroline, 7 Cranch 496; The Adeline, 9 *ibid.* 244; The Dwine Pastora, 4 Wheat. 52; The Harmony, 1 Gallison 123; Orne v. Townsend, 4 Mason, 541.

2. If no monition had issued, or if its service was irregular and defective, it was entirely competent for the Court to have proceeded to direct such a course as would effectually protect the interests of those persons, who were before the Court, by directing notice to be given by publication.

3. It is evident from the nature of the proceedings *in rem*, that those who are interested in the thing seized, being unknown, must receive notice, either by publication, or from the notoriety of the seizure. In most cases, the latter would be the more effectual, as the custody could scarcely be changed without the knowledge of those who were connected with the previous possession. It is usual, however to give notice in some gazette, and by some other mode of publication. In most, perhaps all of the Courts of admiralty of the U. States, the mode

of giving notice on monition is prescribed by rule, and it varies in many of the jurisdictions. (Dunlap's Adm. 134.)

In the absence of all rules of Court, directing the practice in such cases as these, it is probable that the mere taking of the property into the possession by the executive officer of the Court, ought to be considered as notice to all the world; no injury, or none to any extent, can result from this, when it is considered, that in case of default, any claimant may interpose his claim within a year and a day, according to the general course of practice. [Reed v. Owen, 9 Por. 180.] In this case however, the monition was given by publication in a gazette. It is also the general rule, that as soon as the process is commenced and the arrest of the property made, it is considered in the custody of the law, and the jurisdiction of the Court over the thing seized commences. (Burke v. Trevett, 1 Mason 100.)

4. This view is satisfactory to show, that the Circuit Court should not have dismissed the libel; but it is necessary to proceed farther, and ascertain if the judgment by default was regular.

The bond taken by the sheriff in this case, is not the one described by the statute, and therefore, the lien was not discharged by it; but continued in full force, and the Steam Boat is to be considered as yet within the jurisdiction. (The Struggle, 1 Gallison 477.)

We have already held in a former case, *Livingston v. The Steam Boat Tallapoosa*, 9 Porter 111, that where a bond was given, and the lien upon the Boat thereby destroyed, this of itself did not amount to the interposition of a claim, so as to form the *contestatio litis*. But in the present case, there was an express disclaimer made by the attornies, who had marked their names for the defence of any intention to appear in behalf of any person. In this condition of the case, it was proper to proceed to ascertain the lien and its amount. It was competent for the Court to determine this matter for itself, or as done here, to call for a jury. The amount of the lien once ascertained a judgment of condemnation, an order of sale was a matter of course.

What remedy by execution, or by proceeding on the bond as

a stipulation, the parties may have, is not now to be determined.

The judgment of the Circuit Court must be reversed, so far as it sets aside the previous judgment by default, and dismisses the case; and the case is remanded to the Circuit, with instructions to proceed on the judgment entered condemning the Boat for the payment, of the plaintiff's lien.

THE STATE v. UNDERWOOD.

1. The jury may announce their verdict to the Court, *ore tenus*, or in writing; but however rendered, it may be varied by them before they are discharged from the consideration of the case, so as to make it speak their intention: and a change thus made need not be noted in writing
2. Where a written verdict is found in the papers, variant from that recited in the judgment, the *prima facie* intendment is, that the recital in the judgment is correct.

THE defendant was indicted at the Fall term of the Circuit Court of Shelby, holden in 1837. The indictment contains two counts, the first charges an assault and battery, with the intent to commit murder; the second, a simple assault and battery.

At the Spring term holden in 1838, the defendant came into Court and pleaded to the indictment: *First*, not guilty. *Second*, not guilty within six months next before the prosecution against him. Issue was taken upon the first, and there was a demurrer to thesecond plea; which, upon argument was sustained so far as the plea seeks to bar a recovery upon the first count, and overruled so far as it answers the second.

At the Spring term of the Circuit Court in 1839, it appears from an entry in the record, that the defendant pleaded "not guilty" to the indictment; and thereupon the cause was submitted to a jury, who by their verdict, said "that they do not find the said defendant guilty on the first count charged in the bill of indictment, but guilty of a common assault, as charged

in said bill of indictment, and assess a fine of twenty-five dollars;" Whereupon the Court rendered a judgment in favor of the State against the defendant for that sum.

At the Spring term, 1840, the defendant by his counsel, moved the Court to correct the entry of the judgment rendered at the Spring term, 1839, by inserting the verdict then returned by the jury; which was in these words "we, the jury acquit the defendant upon the first count, and find him guilty on the second count, and assess a fine of twenty-five dollars. The defendant further moved the Court for judgment *nunc pro tunc* directing his discharge, &c. upon the ground, that at the Fall term, 1838, a demurrer was sustained to the plea of the statute of limitations, so far as it applied to the first count, and overruled as to the second. To sustain his motion, the defendant produced the written verdict returned by the jury, and the judgment of the Court upon the demurrer to his plea; but the Court overruled the motion, and referred the questions of law thereupon arising to this Court as novel and difficult.

THE ATTORNEY GENERAL, for the State.

PECK, for the defendant.

COLLIER, C. J.—Courts have frequently amended verdicts which are defective, so as to make them conform to the real intentions of the jury. Such amendments are regarded as the mere exercise of discretion, when kept within proper limits; and consequently, the refusal to amend is not revisable on error. The application to the Circuit Court was not strictly a motion to amend a verdict; but a motion to substitute the written verdict which the jury returned into Court, for that which had been entered, as the warrant for the judgment. We cannot conceive how the Court could, with propriety, have granted such a motion. It is not essential to a verdict, that it should be written: the jury may announce it to the Court *ore tenus*, or upon paper at their pleasure; and however rendered, upon the suggestion of the Judge, it may be varied by the jury, in its terms, so as to make it speak their intentions. And the change, thus made in the finding, need not be noted in writing, even if it be such as to entirely supersede the verdict.

How could the Court, holden twelve months after the judgment was rendered, undertake to say that the verdict sought to be substituted had not, upon the jury coming into Court, been superseded by that which was recited in the judgment? It certainly would not be permissible to examine witnesses to falsify the entry. The intendment, then, would be conclusive, that the verdict on which the Court acted, was the last expression of the intention of the jury.

With this view of the question referred, we are entirely satisfied, that the Circuit Court very properly overruled the motion of the defendant, and its judgment is consequently affirmed.

JONES ET AL. v. JOHNSON.

1. Whers a river divides two counties, the Commissioners' Court of either county may establish a ferry over the stream which divides them; which is exclusive of the right of either county to establish another ferry within two miles thereof, unless in the case of a town at or near the ferry so established; in which case, the right exists in either county to establish an additional ferry, if in the opinion of the Commissioners' Court, the public good demands it, subject only to those restrictions pointed out in the statute.

Error to the Chancery Court at Eutaw.

THIS was a bill in chancery, filed by the defendant in error against the plaintiffs in error, to enjoin them from keeping a ferry across the Tombeckbee river. The bill charges that, some four years since, the complainant obtained a license for a public ferry across the Tombeckbee river, at the town of Warsaw; and has, since that time, kept up the ferry by providing boats, &c; that during the last year, a ferry has been established at the same place by the defendant, about two hundred yards from his; and it is admitted, that they obtained from the Commissioners' Court of Greene county, a license therefor

and have given the necessary bond and surety. The bill charges, that the convenience of the public did not require the establishment of another ferry ; and that more than one ferry cannot be supported at that place.

The Chancellor decreed, that the proprietors of the ferry last established, be perpetually enjoined from using it. From which decree, this writ of error is prosecuted.

THORNTON, for plaintiff in error, cited Aik. Dig. 363 ; 3 Porter 418.

HAIR, contra, cited 1 Porter 130.

ORMOND, J.—The Court of Roads and Revenue of the county of Greene, granted to the plaintiffs in error the right to establish a ferry on the Tombeckbee river, opposite the town of Warsaw, in Sumter county, within about two hundred yards of a ferry, which had been previously established, of the defendant in error, some years before. The Chancellor decreed a perpetual injunction of the use of the ferry last established, on the ground that the privilege given by statute, of establishing more ferries than one within a less distance than two miles of each other, where there was a town on a river, was a privilege secured to the county in which the town was situated.

As a matter of right, and as incidental to the right of property, any one owning lands on both sides a river, could establish a public ferry ; but as it is a matter in which the public are deeply interested, the Legislature has by law taken this right from the citizen, and deposited the power with the Court of Roads and Revenue. A ferry established by this Court, excludes all competition within the space of two miles above and below the site of the ferry ; and thus, by securing to him the exclusive privilege, enables the proprietor to provide himself with the necessary boats, hands, &c., to accommodate the public.

The exception to the exclusive privilege is, when the ferry is situate at or near a town. In such a case, it is obvious that one ferry might not be sufficient to supply the necessary convenience of crossing to the public ; and the power to deter-

mine the necessity for an additional ferry or ferries, is confided to the Commissioners' Court, a tribunal peculiarly well qualified to determine such questions, and from whose decision, so far as that question is concerned, there is no appeal.

As the State is intersected by numerous rivers, most of which constitute the boundaries of counties, it is very improbable that the difficulty supposed to exist in this case, was not foreseen. In a case where either of two counties would have an equal right to establish a ferry, the right is given to both; and when the power is exercised by either, it is exhausted. It is in the nature of concurrent jurisdiction, the proper exercise of which by one tribunal, necessarily ousts all others. This was decided by this Court in the case of the State v. Commissioners of Roads of Talladega, 3 Porter 412.

The exception to the power of the Commissioners' Court to grant more ferries than one at the same points, is in truth an enlargement of the power. It is in these words: "But no public ferry shall be established within less than two miles by water of any ferry already established, unless on any river at or within two miles of any town." There is nothing in the language employed which could lead to the conclusion, that the Legislature intended to limit or restrain the general grant of power, which we have seen was made to both counties, of establishing ferries, when an additional ferry was rendered necessary from the neighborhood of a town. Nor is there any thing in the nature of the subject which requires an interpretation different from the natural and obvious import of the language. In the case of a town, there may be a necessity for more ferries than one; but what peculiar propriety is there in giving to the county in which the town is situate, the power of determining this necessity? The people of the county of Greene have the same right of ingress to the town of Warsaw, that the citizens of Warsaw have of egress from it; and it appears to us, that the Commissioners' Court of Greene are as well qualified to determine the question of the propriety of establishing an additional ferry, as the Court of Sumter county.

It is not pretended that the law has, in terms, conferred any such privilege on the county in which the town is situate over the adjoining county; and none such can be presumed from

the nature of the thing, or the necessity of the case, which could alone justify the Court in supposing that such was the intention of the Legislature, in opposition to the plain letter of the law.

It is therefore our opinion, that where a river divides two counties, the Commissioners' Court of either county may establish a ferry over the stream which divides them—that when so established in conformity to law, it is exclusive of the right of either county to establish another ferry within two miles thereof, unless in the case of a town at or near the ferry, when the right exists in either county to establish an additional ferry, if in the opinion of the Commissioners' Court the public good demands it, subject only to those restrictions pointed out in the statute.

We give no opinion as to the question, whether the grant of a ferry gives to the owner of the franchise any claim to the use of the lands of another, as that question is not presented on this record.

The decree of the Chancellor, therefore, granting a perpetual injunction of the use of the ferry of the plaintiff in error, is reversed; and this Court, proceeding to render such decree as the Court below should have rendered, do hereby order, adjudge and decree, that the bill of the complainant be dismissed for want of equity.

BARNES v. BAILEY & DE BARD.

1. When the defendant pleads a payment *puis darrien continuance*, and under that plea, shows the acceptance by the plaintiff of a certain bill and note in discharge of the action, the contract of payment cannot be impeached for fraud, unless there has been a return, or offer to return, the bill and note received under it.

Writ of error to the Circuit of Pickens county.

ACTION of assumpsit on a promissory note. Plea *puis d'rien continuance*, that since the last term of the Court, to writ : on the 29th August, 1840, in the county, &c., he, the defendant, paid to the said plaintiffs the full amount and interest due on the note declared on, whereupon, &c.

Issue to the country, and verdict for the plaintiffs; for which judgment was rendered.

In the progress of the trial, the defendant produced and gave in evidence a receipt in these words : " Received of John A. Barnes a bill of exchange for six hundred dollars, drawn by said Barnes, and endorsed by Thomas Amoson and Blake Little; and a note made by said Barnes, and endorsed by Amoson and Little, for three hundred and forty dollars; which bill and note are received in full payment of a note of said Barnes for eight hundred and thirty-three and sixty-six one-hundredths dollars; payable to James Daniel or order, now in suit in Pickens county, Ala., in the name of Bailey & De Bard, against said Barnes.

Signed, LEWIS BROOKS,
Agent for Bailey & De Bard."

The plaintiff then introduced evidence tending to show that said receipt was obtained by fraud and misrepresentation; thereupon the defendant introduced evidence tending to show, that his agent had proffered to the plaintiff's attorney, a return of said receipt, and a rescission of the contract of settlement shown therein, provided the bill of exchange and note, first specified in the receipt, should be given up to the defendant. But said bill of exchange and note were retained by the plaintiff's attorney, and were not produced on trial, or offered to be surrendered; nor was it shown that the same had ever been offered to be surrendered or returned to the defendant, or to be cancelled.

The defendant asked the Court to instruct the jury, that to avoid the receipt, the plaintiff must bring in and offer to return and surrender the bill of exchange and the note therein specified; or he must show that he had offered to do so at some former time. But the Court instructed the jury, that if they believed the receipt was obtained by fraud, it was void; and that it was unnecessary that the bill of exchange and note

therein specified should be returned to the defendant in order to avoid the force of the receipt. To this charge, the defendant excepted.

He now prosecutes his writ of error, and assigns that this charge is erroneous.

BLISS, for the plaintiff in error, insisted, that the receipt evidenced a contract, which is to be governed by the same rules as other contracts of a similar description. The effect of the receipt was to avoid the note; and if a fraud had been practiced in procuring it, the contract evidenced by it could only be rescinded by consent; or by placing the defendant *in statu quo*, by returning the bill of exchange and note. He ought not to avoid the contract and retain the subjects of it. (Kimball v. Cunningham, 4 Mass. 502; Conner v. Young, 15 ib. 319; Norton v. Young, 3 Greenl. 30; Barton v. Stewart, 3 Wend. 236; Long on Sales 242; Comyn on Con. 48; Pope v. Nance, Minor 299; Christian v. Scott, ib. 354; Pope v. Hickman, 1 Stewart 220-354; McMillion v. Pigg, 3 Stew. 165; Morehaed v. Gayle; 2 S. & P. 224; Wade v. Killough, 3 S. & P. 431; Ogburn v. Ogburn, 3 Porter 128.)

HAIR, *contra*, considered the instructions as proper. Fraud vitiates every transaction, and the note and bill of exchange were of no value in the hands of the plaintiff after he repudiated the contract for the fraud.

The offer to rescind the contract and receive the bill and note, was made to one who had but a special agency, and who was not the general agent of the plaintiff.

The substituted note and bill may have been forgeries; and therefore important to retain for the purposes of public justice.

GOLDTHWAITE, J.—This case is somewhat complex, from the peculiar condition of the parties, with respect to the principle involved. The defendant, by his plea, insists that the contract on which he is sued, has been discharged by payment; and he shows in evidence a new contract, by which the plaintiff agreed to receive a certain bill and note in discharge of the debt. The effect of this new contract is sought to be destroyed on the ground of fraud. What the fraud consisted in, is not disclosed in the bill of exceptions.

It is clear, we think, on principle, as well as authority, that if money had been paid for the bill and note, it could not be recovered back without showing the worthlessness of the paper received; or unless an offer was made to return it.

In the case of *Kimball v. Cunningham*, 4 Mass. 502, the rule is laid down, that a purchaser shall not compel even a fraudulent seller to resort to his action to recover the thing sold.

This rule is also maintained in a great number of cases which have been cited by the counsel for the plaintiff in error, and amongst them are several decisions of our own Court.

In the case of *Pope & Hickman v. Nance & Co.*, Minor 290, this rule was held to preclude one from resorting to his action for the original consideration of a contract, which had been discharged by giving a forged note in payment, unless he shewed a return of the note; or unless he had exhausted all the liabilities on it. Perhaps this case goes too far in asserting, that it was necessary to return, or offer a return, of a worthless instrument; but the decision turns on the fact, that the note was not so to be considered, as it was endorsed by individuals who were not shown to be insolvent. As the record now stands in this case, the plaintiffs have not only a judgment against the defendant on the original contract, but they also have the possession of the note and bill which were given in its discharge. They may, therefore, compel the defendant to resort to his action for the recovery of that which is his own property.

We are satisfied that the present case is not governed by any exception to the general rule. It is not shown that the note and bill could not be returned in consequence of the absence of the defendant; nor is any other cause shown which will excuse the offer to rescind the latter contract, and discharge the plaintiffs from the necessity of placing the defendant *in statu quo*.

The defence is one which occurred after the institution of the suit; therefore, it seems that an offer to return the note and bill at the trial, would have the effect to rescind the latter contract, if it was also vitiated by fraud; but we do not wish to be considered as deciding this question, because it is not now before us.

Let the judgment be reversed, and the case remanded.

INDEX.

ABATEMENT.

1. When bail plead in abatement of the suit against their principal, (as they are permitted to do by statute,) the plea must alledge the existence of the facts which authorize them, as bail, to defend the suit. *De Forest, Morris and Wilkins v. Elkins.* 50.
2. When a plea in abatement is not signed by counsel, this is not a sufficient reason, to set aside the plea at a subsequent term; nor is the objection available on demurrer. *Ibid.*

See Pleading, 1, 2, 3.

See Attachment, 1, 2.

See Error and Writ of, 3, 4, 5.

See Pleading, 24.

ACTION.

1. S. held the obligation of W. to make him a title to a tract of land, and before title was made to the obligee, the obligee sold the land to C., and brought an action against W. on his obligation—Held, that C's declaring himself satisfied with the title which he had, did not bar the action by S. against W. *Watt's Executors v. Sheppard.* 426.

See Lex loci and Lex fori, 3.

See Executors and Administrators, 1.

See Right of Property, Trial of, 10.

See Bonds, Official, 4, 5.

ADMIRALTY PROCEEDINGS.

1. When a steamboat or other craft is proceeded against according to the course of the admiralty, to enforce a lien under the act of 1836, (*Aikin's Digest*, 2 ed. 604,) the entering into the stipulation to perform the decree, which by the statute discharges the lien, does not make the stipulators parties to the suit. *Witherspoon v. Wallis et als. stipulators for the steamboat Asia.* 667.
2. According to the course of admiralty practice, exceptions are never allowed, unless they are raised on specific allegations. *Ibid.*
3. When no claim is interposed, a decree of condemnation is a matter of course; and if a stipulation is entered into under the statute, a judgment is rendered against the stipulators according to the condition of their stipulation. And they will not be permitted to inquire into the correctness of the decree of condemnation, except so far as it may be necessary to correct any error in the judgment against them as stipulators. *Ibid.*

ADMIRALTY PROCEEDINGS—CONTINUED.

4. The omission to issue or serve a writ of monition, in a suit commenced to enforce a lien against a steam boat, is not a sufficient cause, according to the course of admiralty practice, to dismiss the libel. *Bierne & McMahon v. The Steam-boat Triumph.* 738.
5. Where no monition is issued, or if one is issued, and its service is irregular or defective, it is entirely competent for the court to make such order as will effectually protect the interests of those who are not before it. *Ibid.*
6. In the absence of any rules of court directing the practice, it is probable that the mere taking of the steam boat into the possession of the executive officer of the court ought to be considered as notice to all the world; as the jurisdiction over the boat commences with its seizure. *Ibid.*
7. When a bond is taken by the sheriff, conditioned to detain the steam boat seized, if judgment of condemnation shall be given and execution issue, this is not a compliance with the statute; nor is the lien upon the boat discharged. The court may, notwithstanding, proceed to condemnation of the boat, and order its sale. *Ibid.*

AMENDMENT.

1. The thirty-sixth section of the act of 1807: "establishing Superior Courts, and declaring the powers of the territorial Judges," and the fifth section of the act of 1824, "to regulate pleadings at Common Law," are the only statutory provisions in this State in regard to the amendment of judgments. The latter act, which is more explicit, and is, doubtless, intended to confer additional power on the primary courts, authorizes them "to amend any clerical error," &c., "where there is sufficient matter apparent upon the record to amend by."—No amendment, therefore, which is not authorized by the record is permissible. *Armstrong v. Robertson & Barnwell.* 164.
2. Where a judgment is improperly entered by mistake of the clerk, and at the succeeding term amended *nunc pro tunc*, before which term a writ of error *coram vobis* was sued out, and the judgment superseded—held that, although the writ of error *coram vobis* might be wholly irregular, it could not be assigned as error, because there was no final action of the court upon it, and its influence was spent on a void judgment. *Coffey, use, &c. v. Wilson & Gunter.* 701.

See Practice, 1, 2.

APPEALS AND CERTIORARI.

1. A writ of error is not the proper mode for the removal of a cause from a court of revenue and roads, to a superior tribunal. Where a new jurisdiction is created by statute, and the court exercising it, proceeds in a summary method, or in a course different from the common law, a *certiorari* is the appropriate remedy. *Ex parte Tarlton.* 35.
2. When the appeal bond, taken by the justice of the peace before whom the cause was tried, shews the sum for which judgment was rendered, it is irregular to dismiss the appeal, although the justice of the peace has omitted to send a statement of the case to the appellate court. *Larcher v. Scott.* 40.
3. An appeal cannot be prosecuted, by the person in possession, against the complainant, to an order directing possession to be given to the purchaser, but must be prosecuted against the purchaser. *Creighton, et al. v. Paine & Paine.*—158.

APPEALS AND CERTIORARI—CONTINUED.

4. No objection can be taken to a warrant, issued by a justice of the peace, in the firm name of the plaintiffs; and, on appeal, the names may be recited at length in the statement or declaration. *Snow & Co. v. Ray.* 344.
5. The Circuit Court cannot entertain a motion to quash a warrant and execution, issued by a justice of the peace; although the case has been removed by *certiorari*. It must be tried *de novo*, without regard to the defects in the proceedings of the justice. *Carter, Hogan & Plowman v. Douglass.* 499.
6. The refusal of the Circuit Court, to award a *certiorari*, when a diminution of the record is suggested, will not be reviewed on error. *Ibid.*
7. When the defendant, in an appeal cause pending in the Circuit Court, offers to make his defence against the plaintiff's demand, it is error if the court refuse to hear the defence in proof by witness, that he agreed to abide by the decision of another case which was shewn to have been decided after the agreement. Such an agreement to be binding, must be in writing, pursuant to the 15th rule of court. *Ransom v. Peters.* 647.

ARBITRATION AND AWARD,

See Judgment and Decree, 6.

ATTACHMENT.

1. A non-resident, commencing a suit by attachment, need not state the fact of his non-residence in the affidavit. If such is the fact, and no sufficient bond or affidavit is made, it may be pleaded in abatement. *Jackson, use, &c. v. Stanley.* 326.
2. The bond in such a case need not show that the sureties reside within the State; if such is not the fact, the proceedings may be abated. *Ibid.*
3. The plaintiff is not required to be a party to the bond, required to be given by a non-resident, suing out an attachment against a non-resident. *Ibid.*
4. There is no difference between a void bond and a defective bond, given for the prosecution of an attachment, and, in either case, it is the duty of the court to permit the plaintiff to substitute a sufficient bond. *Ibid.*
5. A promissory note or other *chose in action*, cannot be condemned to satisfy the plaintiff's demand. *Jones v. Norris, surviving partner, &c.* 526.

See Practice, 8.

See Execution, Writ of, 7.

BAIL.

1. The condition of a bail bond for the appearance of the defendants in the original cause, at the return term, for their attendance from term to term, until discharged, is sufficient under the statutes of this State, to charge the obligees as special bail. *Embree & Paschal v. Norris & Keith.* 271.
2. It is not a sufficient assignment of the breach of a bond for special bail "that the defendants have failed to deliver their bodies to said Circuit Court, or to the sheriff of said county, and their said securities to said bond having also failed to deliver the bodies of said defendants to said court, or to the sheriff of said county, or otherwise to discharge said bond, whereby," &c. without also alleging that the defendants have not satisfied the condemnation of the court. *Ibid.*

See Pleading, 3.

See Abatement, 4.

BANK.

1. Where a note was made for the payment of a debt due a bank, in one, two and three years, under the provisions of the *second section* of the act of the thirtieth of June, 1837, it does not become due *in toto*, upon a failure to pay the first instalment. *Lightfoot, et als. v. the Branch Bank at Decatur.* 345.
2. The 40th section of the act of incorporation of the State Bank, is directory merely; and, therefore, if a bill is purchased or discounted by the bank, for a larger sum than five thousand dollars, the contract is not therefore void.—*Bates & Hines v. the Bank of the State of Alabama.* 452.
3. A large loan made to one individual, and separate bills of exchange, for five thousand dollars each, taken as security, is within the spirit, if not within the letter, of the prohibition of the 40th section of the charter. *Ibid.*
4. The meaning of the prohibition contained in the 20th section of the charter is, that the bank shall not buy and sell goods, wares or merchandise, for the purpose of gain; or do the ordinary business of a merchant, or trader; or engage in the business of a broker, or commission merchant. *Ibid.*
5. A contract by which a bank lent a large sum of money, taking bills of exchange at nine months for the payment thereof, and received at the time, and as one of the conditions of the loan, a quantity of cotton, with authority to ship it to a foreign port, and sell it for the account, and at the risk and expense of the owner, and to credit his bill with the amount of the nett proceeds, adding the difference of exchange between this State and the place where the cotton was sold, is not a dealing in "goods, wares, or merchandise," within the prohibition of the 20th section of the charter of the bank. *Ibid.*
6. A stipulation in the contract, that the bank shall be allowed to retain one per cent. will not render the contract void; it being evident from the entire contract, that the object of the bank was, not to obtain the cotton to sell on commission, but that the contract gave the bank a mere authority to sell, for the purpose of paying the debt. The stipulation, therefore, cannot be enforced.—*Ibid.*
7. The act of 23d December, 1837, to limit the accommodations of the Presidents and Directors of the Bank of the State of Alabama and its several branches, is, in effect, an expression of opinion by the Legislature, that the proviso to the 40th section of the charter of the State Bank, is directory merely. *Ibid.*
8. The second section of the act of December, 1837, to limit the accommodation of the Presidents and Directors of the Bank of the State of Alabama and its branches, impliedly recognizes the right of the bank to purchase from any one bills drawn on cotton. *Ibid.* 453.

See Summary Proceedings, 2.

See Principal and Agent, 1.

See Pleading, 23.

See Indorser and Indorsee, 2.

See Pleading, 25.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. When a note is dated in May, 1837, and promises to pay a sum of money on the 1st day of January, *one thousand forty*, the intrinsic evidence afforded by the note, is sufficient to determine that the date of payment is the 1st of January, 1840. *Evans, Administrator, v. Stegl.* 114.

BILLS OF EXCHANGE AND PROMISSORY NOTES—CONTINUED.

2. *Semble*—That where a note is payable on demand, a personal demand of the maker is not necessary to entitle the holder to sue. *Henderson v. Howard, Copeland & Co.* 342.
3. A note payable in bank, assigned before it is due, is not subject to an off-set against the original payee, nor can proof be received that it was paid before due. *O'Hara v. The Bank at Hawkinsville.* 367.
4. Where the drawees of a bill had *no effects* of the drawer in their hands from the time it was drawn up to the time of its maturity, in an action against the drawer, the holder will be excused from proving that a presentment was made when the bill became *due*, and that notice of the dishonor was *promptly* given, to the drawer; and such is the law, notwithstanding the bill may be drawn in good faith, and if duly presented would have been honored. *Foard v. Womack, use, &c.* 368.
5. Where the payee of a note is inquired of, by one wishing to purchase it, whether he has any defence against it, and answers that he has none, he does not thereby preclude himself from making any defence against the note growing out of the original transaction, of which he had no knowledge at the time. But if, when so inquired of, he promises to pay it, if purchased, he will be compelled to pay it at all events. *Clements v. Loggins.* 514.
6. Where a bill is dated at a particular place, the drawer cannot be charged by a notice of non-payment deposited in a Post Office and addressed to him at that place, unless that was the Post Office nearest his residence, or unless, upon diligent inquiry, his residence could not be ascertained. *Foard v. Johnson.* 565.
7. A permission to the defendant to use a bill of exchange as a set-off, and to be liable to the owner for the amount only in the event it can be made available as a set-off, is not such a property in the bill as to entitle the defendant to use it as a set-off. *Adams & Taylor v. McGrew.* 675.
8. A promissory note, payable "to the Treasurer of the Manual Labor Institute of South Alabama," is a contract with the corporation, and no action can be sustained thereon in the name of the Treasurer; and the law would be the same, even if the association was not incorporated. *Alston v. Heartman, Treasurer, &c.* 699.

BOND.

See Action, 1.

BONDS, OFFICIAL.

1. The bond required of clerks by the act of 1812, Aik. Dig. 82, is now applicable only to clerks of the County Courts; and the bond required by the act of 1819, to clerks of the Circuit Court. *Bagby, Governor, use, &c. v. McRae.* 708.
2. The conditions of the bond required by these laws are substantially the same. *Ibid.*
3. The condition of a bond of a clerk of a Circuit Court, "that he will duly and faithfully execute his said office according to law, and that he will not remove, or suffer to be removed, out of the county of Mobile, the records and papers of the court whereof he is clerk, or any part thereof," is, in substance, the condition of the bond required by the act of 1819. *Ibid.*

BONDS—CONTINUED.

4. The official bond of a Clerk of the Circuit Court, cannot be put in suit in the name of the Governor, for the use of the person aggrieved ; but must be sued in his name, on the assignment of the Governor. *Ibid.*
5. Such assignment is a mere authority to sue, and does not convey the legal title and therefore the bond may be assigned again, and until the whole penalty is recovered. *Ibid.*

CHANCERY.

1. A party who seeks the aid of a Court of Chancery, after a judgment at law against him, on the ground that he was ignorant of the defence, must show that, by the exercise of ordinary diligence, the defence could not have been discovered ; or that he was prevented from doing so by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his part. *Lee & Norton v. The Insurance Bank of Columbus, et als.* 21.
2. A court of equity will not deprive a party of a legal advantage fairly obtained, where, in *foro conscientiæ*, he has a right to retain the money in controversy. *Ibid.*
3. Equity has jurisdiction in this State to enforce the performance of contracts fairly entered into between parties, able to contract ; but it is an appeal to the extraordinary power of the court, and, therefore, a Court of Chancery will not lend its aid to enforce the specific performance of a contract, unless it is just and reasonable in all its parts, and founded on adequate consideration. The jurisdiction of the court is not compulsory—the question is not what the court must do, but what it may do, under the circumstances. *Gould, Ex'r, and the heirs of Hayes v. Womack and Wife.* 83.
4. Notwithstanding there is no legal bar to dower, in this State, a court of equity may enforce the specific performance of an *ante-nuptial* agreement, in lieu of dower, subject to the same rules by which it is governed in other cases of the specific performance of contracts. *Ibid.*
5. Where one was induced to purchase land by the fraudulent representations of the vendor, in relation to the title, the falsehood of which the vendee had no means of ascertaining, by the exercise of ordinary diligence, he may have relief in Chancery before eviction, and without abandonment of possession. *Younge v. Harris' Administrator, et al.* 108.
6. If the right of the husband has vested, by his possession of property given to his wife and children jointly, the share of the wife may be levied on by an execution against the husband ; but the children may, by suit in equity, enjoin proceedings upon the execution until partition is made, &c. *Dunn & Wife, et al. v. The Bank of Mobile, et al.* 153.
7. *Semble*—If the marital rights of the husband have not attached upon property given to the wife, the latter may apply to equity to prevent the husband from obtaining the possession, until he makes a suitable settlement upon her. *Ibid.*
8. Where it was alledged in a bill, seeking to enjoin an execution against particular property, upon a suggestion that it did not belong to the defendant, that the same property had been previously levied on by another execution against some of the defendants, at the suit of a different plaintiff, which execution had been enjoined,—Held, that such an allegation was not a ground for equitable relief—it did not appear but that the first injunction was prayed upon a ground

CHANCERY—CONTINUED.

- having reference to the judgment or process itself, and not to the property levied on. *Ibid.*
9. When a sale is made by virtue of a decree in Chancery, the court has power to put the purchaser in possession, when it is withheld by the defendant, or any one who has come into possession *pendente lite*. *Creighton, et als. v. Paine & Paine.* 158.
 10. When possession after such a sale is withheld, the proper course is, for the purchaser to petition the court, setting forth his purchase, the deed under which he claims the land purchased by him, and by whom the possession is withheld, and that notice has been given of the application. If the possession is withheld by one who is concluded by the decree, the Chancellor will direct a writ of possession to issue. If this order be not obeyed, an injunction will issue, and if not obeyed, a writ of assistance will issue as a matter of course. *Ibid.*
 11. An appeal cannot be prosecuted, by the person in possession, against the complainant, to an order directing possession to be given to the purchaser, but must be prosecuted against the purchaser. *Ibid.*
 12. When a vendor sells a greater interest than he has in the land, or knowingly sells a defective title, if the vendee is willing to take such title as he has, or such portion of the subject of the contract as he can control, a Court of Chancery will decree a specific performance to that extent. *Weatherford et als. v. James.* 170.
 13. But where the contract is not to convey the fee absolutely, but on a contingency, which has not happened, the vendee is not entitled to insist on the conveyance of a less estate, and an abatement of the price. *Ibid.*
 14. Where a vendee stipulates that, in the event he is not able to make a title in fee to the land, he will execute a mortgage on certain slaves, a Court of Chancery will not decree a conveyance of the land, unless the party is unable to comply with the alternative contract. *Ibid.*
 15. A decree is final, which settles the rights of parties, although there be a reference to the master to compute damages, &c. *Ibid.* 171.
 16. A bond executed for the delivery of property, levied on by execution, when returned "forfeited," has the force and effect of a judgment, and execution may issue thereon, against the obligors; but it is competent for one whose name has been forged as surety to such a bond, to go into equity, and enjoin the execution, upon an allegation that the use of his name was unauthorized. *Brooks, et al. v. Harrison.* 209.
 17. The clerk of the court who has *accepted* a bond for the prosecution of a writ of error, is an essential party to a bill in equity, filed by one whose name appears as a surety, upon an allegation that, as to him, the bond is a forgery. *Ibid.*
 18. Where an answer to a bill in Chancery, sets up facts in avoidance of an allegation of the bill, such facts must be proved, unless the complainant consent that the cause be brought to a hearing on bill and answer; and such consent should appear on the record, either expressly, or by necessary implication. *Forrest and Wife v. Robinson, Ex'r.* 215.
 19. A married woman who has a separate estate, which she may charge, is subject to the operation of the rule, as if she were a *feme sole*. *Ibid.*
 20. The equity of the maker of a deed accompanied by possession, may be sold under execution; but it seems that a Court of Chancery would be authorized to

CHANCERY—CONTINUED.

- interfere, and ascertain and separate the interests of the mortgagor and mortgagee, or maker of the deed, and *cestui que trust*. Williams & Battle v. Jones, Guardian. 314.
21. The complainant in a cause in Chancery, is not entitled to a decree *pro confesso*, until thirty days have elapsed after the service of *subpœna*. Pitfield, et al. v. Gazzam. 325.
 22. In an ordinary case, the reversal of a decree does not affect the title of a purchaser acquired under it. *Quere*. Does not the same rule apply to a purchaser under a decree of foreclosure, where the bill is taken *pro confesso*, within less than thirty days after service of *subpœna*? *Ibid*.
 23. The office of a *supplemental bill*, is to supply a defect, which has arisen in the progress of the suit, by the happening of some event *subsequent* to the filing of the *original bill*; and its object is, to bring before the court matters which have occurred *since* that time. Bowie v. Minter, et als. 406.
 24. Where the *original bill* is itself defective, the *deficiency* may be cured by an amendment. *Ibid*.
 25. The appropriate proceeding when new parties, with new interests, arising from events *since* the institution of the suit, are to be brought before the court, is an *original*, in the nature of a *supplemental bill*. Such bill is, in effect, the commencement of a new suit, but may, in its consequences, draw to itself the advantage of the proceedings on the former bill. *Ibid*.
 26. Where a suit in equity abates by death, or marriage, the proper means of restoring vitality to the cause, is by a *bill of revivor*, to be filed, by or against the person who comes in, in the same right with the original party. *Ibid*.
 27. The proper office of a *bill of revivor and supplement*, is to revive a suit that has abated, and to supply any defects in the original bill, arising from subsequent events; but the supplemental matter must have been newly discovered, and verified by affidavit. *Ibid*.
 28. Where a person, having no interest in the matters litigated, is made a complainant in equity, the bill should be dismissed for a misjoinder of plaintiffs. *Ibid*. 407.
 29. A supplemental bill cannot be filed without leave of the Court; but *quere*, will not the subsequent assent of the court cure the irregularity? *Ibid*.
 30. Whenever the interest of a party to a suit in equity, becomes vested in another, by death or otherwise, the proceedings abate, either in whole or in part; and the regular mode of reviving in the name of the party, on whom such interest devolves, is by a *bill of revivor*. Cullum, et al. v. Batre's Ex'r. 415.
 31. Defective notices and irregularities in practice, are waived, if the parties appear and proceed in the cause without objection. *Ibid*.
 32. An order of publication was duly made, and published, in order to bring in a non-resident defendant; and a decree *pro confesso*, rendered against him; but the record did not show that publication had been made. *Held*, that it was allowable, even after a writ of error sued out, to prove that fact, and have it recited on the record in the court below, *nunc pro tunc*, so as to prevent a reversal of the decree. *Ibid*.
 33. To a bill to foreclose a mortgage, a subsequent incumbrancer is a *proper*, but not an *indispensable*, party. *Ibid*.

CHANCERY—CONTINUED.

34. The object to be effected by joining a subsequent incumbrancer, as a defendant, with the mortgagor, is merely to conclude him as against the complainant; and to secure to the purchaser, under the decree of foreclosure, a title not liable to be attacked by such incumbrancer: *Ibid.*
35. A subsequent incumbrancer, who is made a defendant to a bill of foreclosure, is not entitled to a decree against the mortgaged premises; for so much as may be due on his mortgage. *Ibid.*
36. In the order, referring a bill of foreclosure, &c., to a master, to report an account, it is stated that "the mortgage and notes" were "produced, and proved to the court;" and the master reported, "that, on comparing the mortgage, bill and notes, he finds due the complainant two notes, dated," &c. *Held*, that these recitals, together with the possession of the mortgage and notes, by the complainant, was sufficient to show that her testator was the proprietor of the notes by assignment; especially after a decree *pro confesso*. *Ibid.*
37. It is not, in general, irregular to authorize the master to sell the mortgaged premises "in separate lots, or in whatever manner may best comport with the interest of the defendant; unless infants are interested, and then it should be referred to him to report in what manner their interest should be sold: *Ibid.*
38. Where a court of law can afford adequate relief, Chancery has no jurisdiction. *Caraway v. Wallace, et al.* 542.
39. But if it is admitted that trover or detinue, under such circumstances, will lie, Chancery, notwithstanding, has jurisdiction of a bill filed by the mortgagor to redeem a mortgaged slave: *Sims v. Canfield, Ex'r. of Johnson*. 555.
40. In defence of a bill to redeem, it is not necessary for the defendant to plead or insist on the statute of limitations, if the complainant in his bill, or by evidence in support of it, shews that he has no subsisting title. *Ibid.*
41. It is questionable whether the act of 1806, (Digest 152, s: 2,) was intended to apply to any suit in equity. But courts of equity are governed by its analogies in the same manner as by statutes of limitations. *Ibid.*
42. Courts of equity administer remedies for rights in cases in which courts of law recognize no rights at all, or, if recognized, they are left to the conscience of the parties. Trusts are without any cognizance at common law; but they are cognizable in courts of equity, and a remedy is there given to the parties, beneficially interested, for all injuries arising, either from negligence, or positive misconduct. *Kennedy's Heirs and Executors v. Kennedy's Heirs*. 572.
43. So courts of equity will grant relief, in cases of losses and injuries, by mistake, accident and fraud, as well as undue advantage and imposition, betrayal of confidence, and unconscionable bargains. *Ibid.*
44. Fraud as denounced in equity, includes all acts, omissions or concealments, which involve a breach of a legal or equitable duty, trust or confidence, justly reposed, which are injurious to another, or by which an undue and unconscientious advantage is taken of another. *Ibid.*
45. If a deed is fraudulently obtained without consideration; or for a consideration so inadequate as to shock the conscience, or if by fraud, accident or mistake, a deed is framed contrary to the intention of the parties, the forms of proceeding in courts of law, will not allow them to administer justice; but equity can give the appropriate remedy. *Ibid.*

CHANCERY—CONTINUED.

46. It has been repeatedly declared, that such is the solicitude of courts of equity to suppress fraud, that they will not undertake to enumerate the cases, of which, upon a suggestion of fraud, they will take jurisdiction. *Ibid.*
47. A court of equity will take from a party, the benefit which he may have derived from his own fraud, imposition, or undue influence, in procuring the suppression of an act, intended to be done for the benefit of a third person.—*Ibid.*
48. Parol evidence is admissible to show the fraudulent use of a deed ; or that a party receiving an absolute deed, upon a promise that he would dispose of the property conveyed by it in a particular manner, refused to perform his promise. *Ibid.*
49. Notwithstanding it may not be allowable at law, to show a consideration other and *different* from that expressed in the deed ; yet, the statement of a specific consideration is inconclusive in equity, and will not prevent that court, where fraud is proved, from setting aside the deed, or in the case of an absolute deed from administering equitable relief. *Ibid.*
50. Where an absolute deed, expressing upon its face a monied consideration, was shown by extrinsic proof, to have been made upon a promise, by the grantee to the grantor, that he would hold, or dispose of the property conveyed, for the use of the heirs of the grantor, which promise he refused to perform. *Held*—that the measure of the relief to which the heirs were entitled in equity, was the cancellation of the deed, and this result could not be avoided by the grantee's offering to pay the consideration expressed in it. *Ibid.*
51. In a bill seeking to set aside a deed for fraud, it is not necessary to charge the fraud *in totidem verbis*. If the bill states with directness and precision, facts and circumstances which amount to a fraud, it is sufficient. *Ibid.*
52. So, while it is proper, that every material fact, to which the plaintiff intends to offer proof, should be distinctly stated in the bill ; yet, a general charge, or statement, is sufficient, leaving the circumstances to be made out by proof.—*Ibid.*
53. Although courts of equity look with jealousy and suspicion upon a purchase made by a trustee of his *cestui que trust*, or by an agent of his principal ; yet such purchases are allowable, if the purchaser made a full and fair disclosure, and took no improper advantage. *Ibid.*
54. Where an application is made to equity, to rescind a contract, the undue exercise of an influence, by the defendant over the complainant, resulting from confidence and friendship, exerts great potency in inducing relief. *Ibid.*—573.
55. In a litigation respecting the real estate of a deceased person, his heirs who are interested in the estate, should be parties ; and the powers conferred upon executors by will, may, in some cases, be so extensive as to make them necessary parties in equity. *Ibid.*
56. To coerce a settlement of the accounts of an executor, his executor is the only necessary party, inasmuch as the personal estate is primarily liable to the payment of what may be found due. *Ibid.*
57. In order to prevent multiplicity of suits, courts of equity sometimes entertain bills by complainants between whom there exists no privity of contract, and against defendants between whom there exists no connection whatever, except

CHANCERY—CONTINUED.

a community of interest. Thus it is, in a bill by creditors, to subject a fund to the payment of debts, and of "bills of peace" generally. *Ibid.*

58. *Semble.* The objection of multifariousness is confined to cases where the case of each defendant is entirely distinct and separate in its subject matter from that of his co-defendants; for the case against one defendant may be so entire as to be incapable of prosecution in several suits; and some other defendant may be a necessary party to only a portion of the case. In the latter, multifariousness is not an available objection. *Ibid.*
59. The decisions as to what constitutes multifariousness, are so exceedingly various as to make it difficult, if not impracticable, to educe any general rules, by which to test the objection—the court seeming to regard what was convenient and just in the particular case,—always discouraging the objection where, instead of advancing, it would defeat the ends of justice, *Ibid.*
60. The rule against multifariousness it seems is intended to prevent unnecessary litigation, and needless and oppressive expenses. *Ibid.*
61. Where an absolute deed is made upon a promise, that the grantee will dispose of the property conveyed in a particular manner, the inability to show the terms of the grantee's undertaking, may defeat the intention of the grantor, but cannot prevent the deed from being set aside. *Ibid.*
62. Upon setting aside a deed, on a suggestion of fraud, the rights of both parties must be protected. If the grantee has in good faith made expenditures of money upon the property embraced by it, he is entitled to its reimbursement with interest, &c. *Ibid.*
63. In the construction of statutes, they should be so interpreted, if practicable, that the intention of the Legislature may be carried into effect, and the spirit of the enactment preserved. Under the influence of this rule, the letter is frequently sacrificed to the general purposes and intention of the act. *Ibid.*
64. The Legislature which enacted our statute of frauds, must be presumed to have been cognizant of the construction placed upon the English statute; and in adopting substantially the terms of that enactment, impliedly approved the judicial interpretation, which it and similar acts had received in England and the United States. *Ibid.*
65. It is the settled practice of equity, to direct *an issue at law*, where a question arises upon the validity of a will; and it seems, that it would be irregular to render a decree against the heir, until the invalidity of the devise had been found by a jury. According to the practice of the English Chancery, it is usual to direct an issue to try whether A. is heir, &c. or the existence of a *modus decimandi*, or a real and immemorial composition for tithes. *Ibid.*
66. Although a court of equity, except in the excepted cases, is not bound to direct an issue, merely because the evidence is contradictory; yet where the proof is so conflicting as to make it difficult to attain a satisfactory conclusion, it is a prudent, if not an indispensable, course, to refer the facts to a jury. *Ibid.* 574.
67. The object of an issue is to satisfy the mind of the Chancellor upon matters of fact, but if his conscience is satisfied, without the aid of a verdict, it is competent for him to render a decree, unless it be in the excepted cases. *Ibid.*
68. A decree against infants need not prescribe a time within which they may impeach it after attaining their majority—the statute ascertains the time, and it need not be repeated in the decree. *Ibid.*

CHANCERY—CONTINUED.

69. Since the creation of separate Chancery Courts, a cause cannot be transferred from the Orphans' Court to the Circuit Court, but it seems, in such a case, Chancery would have jurisdiction. *The Heirs of Bond v. Smith, Administrator.* 660.
70. *Semble.* If a judgment is rendered against a party who is not a partner, and who was not served with process, it will be competent for a court of equity to perpetually enjoin its recovery. *Fowlkes & Co. v. Baldwin, Kent & Co.*—705.
71. When the bill in a chancery cause is lost or abstracted from the files, another may be substituted, but if this is not done, no decree can be rendered in favor of the complainant, but the suit must be dismissed. *Glover v. Rainey.* 727.
See Dower, 3.
See Mortgage, 1.
See Mortgage, 3.
See Gift, 3.
See Will and Probate of, 5, 7, 8, 9, 16, 17, 18, 22.
See Mortgage, 4, 5, 6, 7.
See Mortgage, 8.
See Guardian and Ward, 1, 2, 3.
See Fraud, 6.
See Vendor and Vendee, 4.

CONSIDERATION.

1. *Semble*—Notwithstanding the usual expression of consideration, viz: "for value received," &c., the maker of a note may show, as against the payee, or other person standing in the same situation, that the note was given without consideration, or that the consideration has failed; or that a fraud was practised upon him; and under some circumstances that the consideration was illegal. *Litchfield, use, &c. v. Falconer.* £80.
2. As it is allowable for the maker of a promissory note to show the want, or failure, of consideration, in an action against him, he must be permitted to prove the contract, viz: the inducements to the making and receiving the note. *Ibid.*
3. The endorsement of a promissory note is a sufficient consideration for a promise by the endorsee to pay the endorser an equivalent sum. *Ibid.*
See Chancery, 49.

CONSTRUCTION.

1. The meaning of an instrument must be ascertained, generally, from the terms employed; and if these are plain and intelligible, or the instrument can operate, the acts of the parties, claiming under it, are inadmissible, to shew the intention of the party executing it. *Dunn & Wife, et al. v. The Bank of Mobile,* et al. 152.
2. The first general principle in the construction of contracts, is, if possible, to carry into effect the intention of the parties. To do this, the *subject matter* of the contract, the *situation* of the parties, the *motives* that led to it, and the *object* to be attained by it, are all to be looked to. *Watt's Ex'rs v. Sheppard.* 425.
3. Such a construction shall, if practicable, be placed upon a contract, as will make every clause operative. *Ibid.*

CONSTRUCTION—CONTINUED.

4. Where no time is designated, within which an act is to be done, the law requires it shall be performed in a reasonable time. What is a reasonable time, is a question of fact, depending upon the situation of the subject of the contract, &c., as known to the parties, &c. *Ibid.*
5. When words used in a contract are susceptible of two meanings, one agreeable to, and the other against law, the former sense should be adopted. *Bates & Hines v. The Bank of the State of Alabama.* 452.
6. The subject matter of the contract, and the inducements which led to it, must be looked to, to ascertain the meaning of obscure or contradictory parts of it. *Ibid.*
7. The different clauses of a written instrument must be construed together, whether they precede or follow; and the court must not allow to a particular expression a controlling force; but the intention must be gathered from the whole instrument, unless it is obvious, the parties intended otherwise. *Ibid.*
8. If the construction of the contract set out in the plea, is, that the money was advanced upon the cotton, it was also advanced upon the bills; and the bills and the cotton are primary and concurrent securities; and, in that event, a recovery may be had upon the bills, though the transaction, so far as it relates to the cotton, was invalid, *Ibid.* 453.

CONTRACT.

1. In expounding a contract, the intention of the parties, to be gathered from a view of all its parts, the subject matter, time, place and manner of performance, must exert a controlling influence. *Ely, use, &c. v. Witherspoon.*—131.
2. H. sold to S. a tract of land which he had previously purchased from A., and for the payment of which A. held three notes on H., and it was agreed that S. should execute three notes for the same amount, and to fall due at the same time with those held by A. on H., which H. agreed to substitute for those held by A. on him. Held—that if H. failed to substitute one of the new notes for one of the old ones, and S. paid one of the notes thus held by A., it was a valid defence to one of the notes executed to H. by S. when sued on by H. for the use of another. *Honeycut, use, &c. v. Strother.* 135.
3. In such a case, it is no objection to the agreement, to substitute the new notes for the old, that it was parol merely, on the ground that it did not vary the terms of the written agreement. *Ibid.*
4. An offer to return in a reasonable time after the breach of a warranty by the vendor, on the discovery of a fraud practised by him on the vendee, will be as effectual to rescind the contract, as if the offer had been accepted. *Barnett v. Stanton & Pollard.* 182.
5. A contract cannot be rescinded, without mutual consent, where circumstances have been so altered by a past execution, that the parties cannot be put *in statu quo.* *Ibid.*
6. Where the vendee does not rescind the contract upon the discovery that the vendor has committed a fraud, he cannot avoid the payment of the purchase money, *in toto*—the deduction, if any, can only be to the extent of the injury which the vendee has sustained by the fraud. *Ibid.*
7. In order to rescind a contract of sale, at the instance of the purchaser, an offer to return the goods should be made in a *reasonable time* after the purchase.

CONTRACT—CONTINUED.

The non-residence of the vendor furnishes no excuse for delay, if his domicile was known, or might have been ascertained on inquiry; and what is a *reasonable time*, is a question of fact for the jury. *Barnett v. Stanton & Pollard*. 195.

8. A plea recited certain rules and regulations of the State Bank, proposing to make advances on cotton, on certain terms and conditions, particularly set forth in the rules and regulations—that pursuant thereto, one Major Cook, pretending to act as agent for the bank, advanced to the defendant, Bates, seventy-nine thousand six hundred and thirty-two dollars, and received from him one thousand and twenty-two bales of cotton; that thereupon the said Cook executed a receipt, or statement setting forth the receipt of the cotton, and advance of the money aforesaid, under the rules and regulations aforesaid; whereupon, the defendants executed the bill of exchange sued on, and fifteen others, amounting in all to the sum of money advanced, which were delivered to the said Cook; then follows an averment that the said sum of money was received for, and on account of, the cotton so delivered, and not for, or on account of the said bills of exchange, but that the bills of exchange were to be held by the bank, for the purpose of securing to it the payment of such sums as the nett proceeds of the cotton, when sold, might be less than the sum of money advanced upon it: Held—

First—That this last averment of the plea was not the averment of an independent fact unconnected with the rest of the plea; but was a conclusion of the pleader from the facts previously averred.

Second—That, if it was considered as a separate averment, unconnected with the preceding averments, then the plea would be bad, as it would offer two distinct issues of fact; one upon a contract made pursuant to, and by authority derived from, the “rules and regulations of the bank;” and another on a contract made without reference to these rules and regulations.

Third—That the plea did not question the regularity of the appointment of Cook, but impliedly affirmed it.

Fourth—The contract described in the plea, is not a dealing in “goods, wares and merchandise,” within the meaning of the prohibition, contained in the 20th section of the charter of the bank. *Bates & Hines v. The Bank of the State of Alabama*. 451.

9. A contract by which a bank lent a large sum of money, taking bills of exchange at nine months for the payment thereof, and received at the time, and as one of the conditions of the loan, a quantity of cotton, with authority to ship it to a foreign port, and sell it for the account, and at the risk and expense of the owner, and to credit his bill with the amount of the nett proceeds, adding the difference of exchange between this State and the place where the cotton was sold, is not a dealing in “goods, wares, or merchandise,” within the prohibition of the 20th section of the charter of the bank. *Ibid*. 452.
10. A stipulation in the contract, that the bank shall be allowed to retain one per cent. will not render the contract void; it being evident from the entire contract, that the object of the bank was, not to obtain the cotton to sell on commission, but that the contract gave the bank a mere authority to sell, for the purpose of paying the debt. The stipulation, therefore, cannot be enforced.—*Ibid*.

CONTRACT—CONTINUED.

11. When words used in a contract are susceptible of two meanings, one agreeable to, and the other against law, the former sense shall be adopted. *Ibid.*
12. The subject matter of the contract, and the inducements which led to it, must be looked to, to ascertain the meaning of obscure or contradictory parts of it. *Ibid.*
13. The different clauses of a written instrument, must be construed together, whether they precede or follow; and the court must not allow to a particular expression a controlling force; but the intention must be gathered from the whole instrument, unless it is obvious that the parties intended otherwise. *Ibid.*
14. The legal effect of the transaction recited in the plea is, that the bills were purchased by the bank, and the cotton received as security only, for the repayment of the money advanced on the bills. *Ibid.* 453.
15. If the construction of the contract set out in the plea, is, that the money was advanced upon the cotton, it was also advanced upon the bills; and the bills and the cotton are primary and concurrent securities; and, in that event, a recovery may be had upon the bills, though the transaction, so far as it relates to the cotton, was invalid. *Ibid.*
16. A vendee of land cannot entitle himself to a rescission of the contract, by tendering the purchase money, and demanding title before the time stipulated by the contract for making the title. *Clements v. Loggins.* 514.
17. Nor is it any objection that the title is not then in the vendor, if he can obtain the title. *Ibid.*
18. A contract, absolute in its inception, and consummated by delivery of the property, will not be converted into a conditional sale, by an ambiguous phrase afterwards endorsed on it, even if such would have been its effect if a part of the original contract. *Caraway v. Wallace et als.* 542.
19. C. sold to W. certain slaves on a credit, and delivered them; and sometime afterwards an agreement was entered into, and endorsed on the contract, by which it was stipulated that payment should be made within the next month, in the notes of other persons; at which time, a bill of sale of the slaves was to be executed by the vendor. *Held*—That this was not sufficient to show that the parties intended to rescind the former sale, and convert it into a conditional one. *Ibid.*
20. Upon setting aside a deed, on a suggestion of fraud, the rights of both parties must be protected. If the grantee has in good faith made expenditures of money upon the property embraced by it, he is entitled to its reimbursement with interest, &c. *Kennedy's Heirs and Executors v. Kennedy's Heirs.* 573.

See Interest, 1.

See Construction, 1.

See Construction, 2, 3, 4.

See Gift, 6.

See Estates of Deceased Persons, 2, 4.

See Fraud, 7.

CORPORATION.

1. An artificial person is bound by the same implications and inferences, which bind a natural person. *Bates & Hines v. The Bank of the State of Alabama.* 452.

CORPORATION—CONTINUED.

2. A promissory note, payable "to the Treasurer of the Manual Labor Institute of South Alabama," is a contract with the corporation, and no action can be sustained thereon in the name of the Treasurer; and the law would be the same, even if the association was not incorporated. *Alston v. Heartman, Treasurer, &c.* 699.

See Principal and Agent, 4.

COURT, SUPREME.

1. The Supreme Court cannot issue a *remedial or original writ*, to a court of revenue and roads, unless, perhaps, where the Circuit Court of the county, has, upon a formal application, refused its interference. *Semble*—it will be sufficiently early to resort to the Supreme Court, after the Circuit Court declines acting, or, having acted, mistakes the law. *Ex parte, Tarlton.* 35.
2. The Supreme Court is not precluded from examining a question referred to it as novel and difficult, because the action of the Circuit Court on it is purely discretionary. *The State v. Morea.* 275.
3. When the evidence is not stated, in the reservation of a question for the decision of the Supreme Court, and in the absence of any request to modify a charge, the charge will be considered as warranted by the facts; and its correctness in point of law will alone be considered. *Ibid.*
4. The Supreme Court will, on motion of the plaintiff, at the first term, award a *scire facias to hear errors*, although a citation had not previously issued; but if such a motion be not submitted previous to the second term, nor an appearance entered, then, on motion of the defendant, the cause will be dismissed for want of a citation. *Roebuck v. Duprey.* 352.
5. This Court will not revise the action of the Circuit Court in admitting evidence out of the usual course of proceeding. The course of proceeding is always within the discretion of the court, and no revising court can ascertain whether a departure from the usual course is calculated to advance or defeat the justice of the case. *Towns v. Riddle.* 694.

See Mandamus, 1, 2, 3.

COURT, CHARGE OF.

1. It is not error for the court to instruct the jury, that, admitting the facts shewn to be true, they do not entitle the plaintiff to recover, if, upon the defendant's demurring to the evidence, the court should have rendered a verdict in his favor. *Sims, by her guardian v. Sims, Adm'r.* 117.
2. Where it appears that a party "was in the habit of having clothes manufactured at the north for the Mobile market," it cannot be assumed as a conclusion of law, that he was really the manufacturer, but the question should be referred to the jury for their decision. *Barnett v. Stanton & Pollard.* 195.
3. Where the defendant adduces no evidence, and that on which the plaintiff relies is, either in whole or in part, oral testimony, or depositions, it is error for the court to charge the jury, that the evidence of the plaintiff is sufficient to authorize a recovery; unless it is overbalanced by the proof of the defendant. Such a charge assumes the credibility of the witnesses—a question which should be referred to the jury. *Huff et al. v. Cox.* 310.
4. *Semble*, under some circumstances, an appellate court will reverse on error, for a charge to the jury, which, though correct in the abstract, is calculated to mislead them. *Toulmin v. Lesesne & Edmondson.* 359.

COURT, CHARGE OF—CONTINUED.

5. Where the question is, whether a negro was sound, at the time the defendant purchased him of the plaintiff, the court should not charge the jury, that if he had a chronic disease of the chest a few weeks after the purchase, it was scarcely possible that he was sound at the time of the sale. Such a charge is opposed to the statute, which prohibits the judges from charging juries "with respect to the matters of fact." *Jones v. Yarborough.* 524.
6. When a charge is correct in point of law, although there may be no evidence to warrant the charge, the judgment will not be reversed, unless the result shows, that the jury were misled by the generality of the charge. *Towns v. Riddle.* 694.
7. If a charge to the jury is too broad abstractedly considered, the revising Court will refer to the prayer, in answer to which it was given, and the evidence in the cause to ascertain if it be objectionable. *Jones v. Davis.* 730.
See Contract, 7.

COVENANT.

1. When the defendant covenants to pay a stipulated rent for certain premises, and is let into possession, and continues to enjoy it until the end of his term, it is no defence to an action of covenant, that the plaintiff has omitted to make certain improvements and repairs to the leased premises. In such a contract the stipulations are independent. *Hill v. Bishop.* 330.
2. In an action of covenant, the plaintiff's verdict for damages may be reduced by showing that the defendant has been injured, and to what extent, by the plaintiff's omission to perform his stipulations contained in the same contract. *Ibid.*
3. Although a deed contains express covenants, yet other covenants may be implied; but the latter can only operate where they are consistent with the former. *Roebuck v. Dupree.* 535.
See Warranty, 7.

CRIMINAL CASES AND PROCEEDINGS IN.

1. The 10 sec. of the 1 Art. of the Constitution, guaranties to one indicted for a crime, the right to be present in court, that he may discuss questions of law and fact, which may arise either preparatory to, or pending the trial, and that he may point out objections to the action of the jury, or other proceedings in the cause. *The State v. Hughes.* 102.
2. One tried for a crime, has a right to be present when the jury return their verdict against him, that he may examine them by the poll, to ascertain if they assent to his conviction. *Ibid.*
3. Where a verdict of "guilty," in a case punishable capitally, was received by the court, in the absence of the accused—held, that although the court erred in thus receiving the verdict, yet the accused was not entitled to his discharge, but should be tried *de novo.* *Ibid.*
4. When a slave has been convicted of a capital offence, it is not a sufficient reason to arrest the judgment, that the jury have omitted to assess his value, and to ascertain what portion of it shall be paid by the State to his owner, in pursuance of the provisions of the act of 1824. [*Aikin's Digest*, 124, s. 60, 64.] *The State v. John, a slave.* 127.

CRIMINAL CASES AND PROCEEDINGS IN—CONTINUED.

5. When a juror has once been sworn in chief, he cannot be challenged or set aside from the jury, for any cause which existed at the time of his being put on the prisoner. *The State v. Morea.* 275.
6. When an opinion is formed by a juror, (but never expressed,) on mere rumor, this is no cause of challenge. *Ibid.*
7. An opinion formed from a conversation held with a physician, who is not a witness to any of the facts of the prosecution, but who, in the course of the trial, is called as a witness, to give his professional opinion, does not disqualify a juror. *Ibid.*
8. In a prosecution for murder, if the death of the deceased was accelerated by the violence of the prisoner, his guilt is not extenuated, because death might, and probably would, have been the result of a disease, with which the deceased was afflicted at the time of the violence. *Ibid.*
9. The act of 1836, which directs that, in capital cases, whenever points are reserved as novel and difficult, for the decision of the Supreme Court, the execution of the judgment shall be suspended to a time, not less than twenty-five nor more than forty days after the commencement of the next succeeding term of the Supreme Court, confers a right on the criminal, who is sentenced under such circumstances, to the delay given by the statute; and a sentence fixing an earlier day for his execution is erroneous. *John, a slave, v. The State.* 290.
10. When more persons than one are indicted, and the venue is changed by less than the whole number, those who change the venue must be tried on a copy of the indictment; the original, in such a case, remains in the court which retains jurisdiction over the one who does not change the venue. *Ibid.*
11. When an order has been made on the change of venue by one defendant, for the transmission of the original indictment to another county, the court retaining jurisdiction over the defendant as to whom the venue is not changed, may properly make an order to obtain the custody of the indictment so transmitted to another county, and proceed to trial against the defendant within its jurisdiction. *Ibid.*
12. When the indictment is re-transmitted from the court to which it was irregularly ordered, it is unnecessary that it should be certified by the clerk of the court. *Ibid.*
13. A writ of *venire facias* to summon a grand jury, directed "to any sheriff of the State of Alabama," if received, executed and returned by the proper sheriff will be good. *The State v. Phillips.* 297.
14. Witnesses who are present when the other witnesses are sent out under the rule, cannot be examined as a matter of right, and from the operation of this rule attorneys at law are not excluded. *The State v. Brookshire.* 303.
15. If a witness sent out under the rule, returns of his own accord, or if a witness should arrive pending the trial, and hear the testimony, or a part of it, their introduction as witnesses will depend on the discretion of the court. *Ibid.*

See Evidence, 2.

See Indictment, 2.

See Witness, 2.

See Statute, 26.

DAMAGES.

1. Unliquidated damages cannot be the subject of a set-off. *McCord v. Williams & Love*. 71.
2. Damages resulting from the breach of a contract, are unliquidated when there is no criterion provided by the parties, or by the law operating on the contract, by which to ascertain the amount of the damages. *Ibid*.
3. In an action on the case, against a sheriff for neglecting to arrest a defendant, on civil process, or, for permitting his escape after arrest, the measure of the plaintiff's damages is the injury sustained by the failure of the officer to discharge his official duty. *Pugh v. McRae*. 393.
4. Where the damages, resulting from the non-performance of a contract, are uncertain, and cannot be admeasured with any degree of accuracy, there the sum agreed to be paid by the party in default, will be regarded as liquidated damages. *Watt's Ex'rs v. Sheppard*. 425.
5. Where a party stipulates to perform work by a definite time, and upon default, to pay so much weekly or monthly, if the sum is not so unreasonably large as to induce the belief that the parties never contemplated its payment, it will be considered as liquidated damages. *Ibid*. 426.
6. The terms "penal sum"—"liquidated damages," &c. are not conclusive to show the true character of the sum agreed to be paid in the event of non-performance of a contract. *Ibid*.
7. It is permissible to show by proof, the value of property agreed to be conveyed, or delivered; and the consideration moving from the other party therefor, as criteria by which to ascertain, whether a sum agreed to be paid upon default, is a penalty, or liquidated damages. *Ibid*.
8. The recital in a contract that, in consequence of the *difficulty* of ascertaining the injury which would result from a non-performance, the parties agree upon a sum as *stipulated damages*, is no evidence of the *difficulty*, &c.; yet it shows that the parties intended to liquidate the damages by contract; and, if the sum agreed is a reasonable compensation, it is proper that the intention of the parties should be carried in effect. *Ibid*.
9. Where a party undertakes to convey a large tract of land, and upon default, either in whole or in part, agrees to pay a certain sum, as "*stipulated damages*," if he conveys a part, the measure of damages which the obligee is entitled to recover, is the value of the land not conveyed, estimating the *entire tract* at the *sum stipulated*. *Ibid*.
10. Where the measure of damages is the value of a life estate, the plaintiff, upon proof of the value of the absolute property, may recover nominal damages, if no more. *Oden v. Stubblefield*, 684.
11. *Semble*—Where the plaintiff in an action of *detinue*, proves a life estate in slaves, the jury may ascertain by their verdict the value of the absolute property, and the judgment may be for the recovery of the slaves, or their alternate value: if the damages were limited to the value of the life estate, the defendant would pay the damages, instead of restoring the property, and thus defeat the object of the action. *Ibid*.

See Penalty, 1, 2.

See Penalty, 3, 6.

DEED AND REGISTRATION OF.

1. When two clauses of a deed are so inconsistent with, or repugnant to, each other that both cannot stand, the first will be enforced, and the latter rejected; but it is the duty of the court to reconcile them, if possible. *Gould, Ex'r, and the Heirs of Hayes v. Womack and Wife.* 83.
2. A deed may be properly registered upon the acknowledgement of the grantor alone. *Williams & Battle v. Jones, Guardian.* 314.
3. Although a deed undertaking to convey property, recites a valuable consideration, as an inducement to its execution, it is, notwithstanding, competent for a creditor of, or purchaser from the grantor, to show, that it was intended as a mere gift. *Myers v. Peek's Adm'r.* 648.
4. A deed of gift of goods and chattels, where possession remains with the donor, will not under the second section of the statute of frauds, vest a title in the donee, unless it is recorded; yet, it may be regarded as a parol declaration of the donor's wishes, and to make it operate as a gift, it is necessary to show that the subject was actually delivered. *Ibid.*

See Statute, 13, 14, 15.

See Fraud, 4.

See Covenant, 3.

See Gift, 6.

See Gift, 8.

See Statute of Frauds, 9.

DELIVERY BONDS.

See Chancery, 15.

DEPOSITION.

1. A commission to take the deposition of a witness, issued "to George W. Sneed, or any justice of the peace of Lauderdale county," &c. and was executed by "Joseph Bigger," who certifies that he is a justice of the peace of that county; —*Held*, that it was good as an authority to Sneed, but did not authorize any one else to take the deposition of the witness. *Campbell & Webb v. Woodcock.* 41.
2. Where it appears, from a written memorandum, signed by counsel, that they have consented that a commission to take the testimony of non-resident witnesses might issue without the names of the commissioners being therein inserted; and the commission is filled up afterwards, no exception can be taken for this irregularity. *Hall v. Lay.* 529.

See Evidence, 6.

DOWER.

1. At common law, the right to dower could not be waived or lost, by an agreement in lieu of dower, made previous to marriage—and as there has been no alteration of the common law, by statute, in this State, it follows, that an *ante nuptial* agreement, entered into previous to marriage, will oppose no obstacle to the allotment of dower in the County Court. *Gould, Ex'r and the Heirs of Hayes v. Womack and Wife.* 83.
2. Notwithstanding there is no legal bar to dower, in this State, a court of equity may enforce the specific performance of an *ante-nuptial* agreement, in lieu of dower, subject to the same rules by which it is governed in other cases of the specific performance of contracts. *Ibid.*

DOWER—CONTINUED.

3. Where an old man of fifty-six years of age, on the eve of marriage with a young woman, procured from her a relinquishment of dower in his estate, which was very large, on condition of his settling on her a life estate of small value, which she agreed to accept in lieu of dower, unless he should think proper to make an additional settlement on her at his death—before which event, which happened six years afterwards, he made his will and gave her an annuity of fifteen hundred dollars a year during her life—gave her the use for life, of some land and slaves, and directed his executors to make annual provision for her support, upon the acceptance of which, she was not to be entitled to the property secured to her by the ante-nuptial contract. Held—that this was not such an agreement as a Court of Chancery could be called on specifically to perform, on the ground that it was not just or reasonable—

First—Because the provision made by will, pursuant to the expectation created by the *ante-nuptial* contract, was a life estate only, which, considering the age of the dowress, was, of itself, a sufficient objection.

Second—Because, when compared with the legal dower, it was not an adequate provision, although ample for support. *Ibid.*

4. When lands which have been mortgaged, are devised to the widow of the mortgagor, and she has not dissented from the will, by which she is also entitled to other estates, she has no equitable claim to dower against the mortgagee. *Inge, et als v. Boardman.* 331.

ERROR AND WRIT OF.

1. The refusal of the Circuit Court to allow an individual to file an information, in the nature of a *quo warranto*, is a final judgment, which can be reviewed on a writ of error, whenever the object of the information is to ascertain the relator's rights to the usurped office or franchise. *The State, at the relation of Hill, v. Burnett.* 140.
2. Where a defendant pleads an affirmative plea, the *onus* of proving which lies upon himself, the most regular course would be to reply, or demur to it; yet, if the defendant does not appear to sustain his plea, and a judgment by default is rendered in favor of the plaintiff, it will not be reversed on error; for the irregularity was one from which no injury resulted. *Dougherty v. Colquitt, use, &c.* 337.
3. Where a plaintiff dies before the return of a writ of error, the writ abates; and can only be revived by the representative of the deceased filing the writ, and transcript of the record, in the appellate court. *Ex parte, Norris, Stodder & Co.* 385.
4. If the plaintiff dies before the return of the writ of error, the defendant cannot suggest his death, and move for an affirmance of the judgment, on producing a certificate or citation; for there is nothing in court on which the suggestion may be founded; and the consent of the personal representatives to be made a party, if the writ is not filed, cannot authorize a judgment of affirmance. *Ibid.*
5. If a writ of error is not prosecuted to the return term, it abates by operation of law; and if the plaintiff in error has died, the judgment may be revived, or the bond for the prosecution of a writ of error, may be put in suit. *Ibid.*
6. The declaration states that the note sued on, was made in "Kemper County, Mississippi;" held that the meaning of the averment was, that the note was made in the State of Mississippi, and as it must be held to be there payable, un-

ERROR AND WRIT OF—CONTINUED.

less shown to be payable elsewhere ; it was error to take judgment by default, and compute the damages without proof of the rate of interest of the State of Mississippi. *Dunn v. Clement*. 392.

See Estates of Deceased Persons, 2, 3, 4.

See Practice, 19.

See Chancery, 32.

ESTATES OF DECEASED PERSONS.

1. When there is a final settlement of a solvent estate, by the administrator, before the County Court, the administrator, on the one side, and all those claiming distribution on the other, are necessary parties to the settlement. *Merrill v. Jones*. 192.
2. In such a case, the distributees named in the judgment of the County Court, occupy the position of joint plaintiffs, not because their interests are necessarily joint, but because such judgments arise out of the same proceedings, and the case cannot be removed, piece-meal, into an appellate court. *Ibid*.
3. When the writ of error, in such a case, is sued out by one only, when several persons are declared distributees by the judgment of the County Court, the appellate court has no jurisdiction, and should dismiss the writ of error. *Ibid*.
4. If the Circuit Court reverses a judgment of the County Court, on such a writ of error, the reversal is irregular, and the judgment of reversal will be reversed, and the case remanded, with instructions to dismiss the writ of error. *Ibid*.
5. When an executor or administrator petitions the County Court for leave to sell the lands of the deceased, on the ground that the personal estate is insufficient to pay all the just debts of the deceased, the heir may show that such debts are not a charge on the estate, being barred by the statute of limitations. *The Heirs of Bond v. Smith, Administrator*. 660.
6. An order of the County Court, directing the administrators to sell pursuant to the will, land acquired previous to its execution, is a nullity. *Meador & Meador v. Sorsby*. 712.
7. The rule of law is the same, whether the title of the deceased to the land was legal or equitable. *Ibid*.
8. The purchaser at such a sale may rescind the contract ; and the case is not varied by the fact that a deed for the land has been executed by the person holding the legal title, to be delivered to the purchaser on the payment of the purchase money ; as the minor heirs would not be precluded from asserting their title when they came of age. *Ibid*.

See Chancery, 55.

EVIDENCE.

1. A witness for the State was asked by the prisoner's counsel, whether he had not made certain statements to two persons, who were named, or any other person, which he denied. The two persons thus named were examined, and testified that he had made the statements imputed, when another being called and the same questions being propounded, on motion of the solicitor he was not permitted to testify. The prisoner's counsel then proposed to call back the State's witness, and ask him whether he had not held the conversation imputed to him, with the last witness, which the court refused. Held—that the court ruled correctly, in refusing to permit the witness to testify ; and that not

EVIDENCE—CONTINUED.

- permitting the State's witness to be called back, was a matter of discretion, and not revisable in this court. *The State v. Marler.* 43.
2. Where insanity is set up as a defence for the commission of crime, it should be established to the satisfaction of the jury, by strong, clear, and convincing proof. but if the jury entertain a reasonable doubt of the sanity of the prisoner, he should be acquitted. *Ibid.*
 3. No certain rule can be laid down, as to the quantity or quality of the preliminary proof, necessary to be made, to authorize the introduction of secondary evidence of the contents of a lost instrument. But it is, in general, true, that much stricter proof will be required of the loss, and a more rigid search exacted, in a case where any motive for the suppression of the instrument may exist, than will be required, when, from the circumstances no fraud can be presumed—as where a written copy exists, made under such circumstances as to preclude the supposition that the copy was fraudulently made. *Jones, et al. v. Scott.* 58.
 4. When a lawyer employed to bring a suit, testified that he had made a copy of a bill of lading on a writ, in a suit he was employed to bring; that he had made diligent search for it among his papers, and could not find it, and was under the impression he had returned it to Sims & Scott, the plaintiffs—and the surviving partner of Sims & Scott, also testified that he had searched for it among the papers of the firm, and could not find it, and had also examined the papers of the deceased partner, though for a different purpose, without seeing it—Held sufficient to authorize the introduction of secondary evidence of the contents of the lost paper. *Ibid.*
 5. A residuary legatee cannot be a witness in a suit, the result of which may augment or diminish the fund in which he may participate. *Ibid.*
 6. All depositions are taken *de bene esse*, and although a witness was competent when his deposition was taken, it cannot be read in evidence, if he is incompetent at the time of the trial. *Ibid.*
 7. A certified copy of a deed duly acknowledged and recorded, is inadmissible as evidence, without accounting for the absence of the original. *Fryer v. Dennis.* 144.
 8. Parol evidence is not admissible to contradict, vary, or materially affect, by way of explanation, a contract in writing, either in its terms or *legal effect*. *Litchfield, use, &c. v. Falconer.* 280.
 9. Where part of a deposition is admissible evidence, and part not, upon an objection to the entire deposition, the court is not bound to distinguish between the legal and illegal testimony, but may overrule the objection generally.—*Ibid.*
 10. Where a promissory note is payable on a day certain, it is not permissible to show, that by a verbal agreement made simultaneous with, or previous to, the time it was made, that it was agreed that payment should not be required until a more distant day, or the happening of a future event. *Ibid.*
 11. When the defendant, in presence of the plaintiff, and previous to entering into a contract for the rent of certain premises, insisted on repairs and improvements being made as an inducement to the contract, his estimate of the value of the improvements, &c., made in the presence of the plaintiff, cannot be given in

EVIDENCE—CONTINUED.

- evidence to the jury, for it leads to no conclusion that the value was admitted by the plaintiff. *Hill v. Bishop.* 320.
12. In an action brought to recover damages for an assault and battery, by the wife of the defendant on the wife of the plaintiff, the admissions of the wife of the former cannot be given in evidence to charge her husband. *Hussey & Wife v. Elrod & Wife.* 339.
 13. The declarations of a nominal plaintiff cannot be given in evidence, to defeat the action; therefore, where a suit is brought in the name of C. & L. for the use of another, a writing executed by L. dated previous to the execution of the note sued on, if evidence for any purpose, could only be received on proof of the truth of its date. *Copeland & Lane, use, &c. v. Clark.* 388.
 14. The execution of a note raises the presumption of a settlement of accounts previous to its date. *Ibid.*
 15. The admissions of a party, whom the sheriff is charged with having permitted to escape, or failed to arrest on civil process, are evidence against the sheriff to show the extent of the liability of the party escaping, or not arrested, to the plaintiff, whether he can or cannot be examined as a witness. *Pugh v. McRae.* 393.
 16. General reputation cannot be given in evidence, to establish the existence of a co-partnership between individuals. *Carter, Hogan and Plowman v. Douglass.* 499.
 17. On the trial of an issue, made upon the answer of a garnishee, who claimed to hold certain effects of the defendant in execution, by virtue of a conveyance from him; proof of what he said at, and previous to the conveyance, for the purpose of impeaching the transaction as fraudulent, is not admissible, unless the declarations were made in presence of the garnishee. *Jones v. Norris, surviving partner, &c.* 526.
 18. Such illegal evidence cannot be made good by the instruction of the court to the jury that it should not prejudice the garnishee. *Ibid.*
 19. It is not permissible to add to, or vary a contract in writing, by parol evidence; unless the party offering such evidence will lay a ground for its introduction, by the proof of fraud. *Kennedy's Heirs and Executors v. Kennedy's Heirs.* 571.
 20. Neither the common law, nor the statute of frauds and perjuries, inhibit the admission of parol evidence to vary, or totally defeat, a written contract tainted with fraud. *Ibid.*
 21. Parol evidence is admissible to show the fraudulent use of a deed; or that a party receiving an absolute deed, upon a promise that he would dispose of the property conveyed by it in a particular manner, refused to perform his promise. *Ibid.* 572.
 22. The testimony of a witness who speaks positively to a fact, is entitled to more consideration than several witnesses whose statements are merely negative.—*Ibid.* 573.
 23. Proven specimens of the hand writing of the defendant cannot be given in evidence to the jury, to be compared by them with the signature to the writing, the genuineness of which is controverted. *Little, Administrator de bonis non of Beazly, deceased, v. Beazly.* 703.

EVIDENCE—CONTINUED.

24. Where proceedings before a justice of the peace are evidence in a cause, it is not necessary to produce the original papers, but sworn copies compared by any competent person to whom the justice will intrust the originals for that purpose, are admissible. *Jones v. Davis*, 730.

See Witness, 1.

See Bills of Exchange and Promissory Notes, 1.

See Contract, 2, 3.

See Right of Property, Trial of, 3.

See Consideration, 1, 2.

See Record, 1, 2.

See Witness, 6.

EXCEPTIONS, BILL OF.

1. Where an exception is regularly taken during the progress of a trial, but the bill of exceptions is deferred to be signed at a more convenient time, and the term of the court is terminated after the entry of the verdict and judgment, by the Judge's withdrawing from the bench, and by his refusing to return to it—if the Judge refuses to sign the bill of exceptions, it will be allowed by the Supreme Court, and ordered to be filed on proof of these facts. *Bartlett & Waring v. Lang's Adm'rs*. 161.

See Practice, 14.

EXECUTION, WRIT OF.

1. A judgment was rendered against W. M. and W. F. E. and a writ of *fiery facias* issued thereon, against the goods, &c., of W. W. M. and W. F. E.—Held, that the insertion of the initial of a middle name, was not such a departure from the judgment as to avoid the execution, and that if necessary the judgment might be aided by the declaration, in which the defendants were described as in the execution. *McMahon & Evans v. Colclough*. 68.
2. Where a judgment is confessed for a *debt*, while the execution describes it as being rendered, in consequence of "the non-performance of a certain promise and assumption," the variance is immaterial. *Ibid*.
3. The omission of the words "late of your county," after the defendants' names in an execution, though contained in the statute form, cannot be regarded as essential to its validity. *Ibid*.
4. The statute form supposes the damages and costs, for which judgment is rendered, to be added together, and an execution to issue for the aggregate; it is however, no objection to an execution that it issue for the amounts of each, separately stated. *Ibid*.
5. It is no objection to an execution, that it was not issued by the clerk, or a *duly qualified deputy*—it may be made out and subscribed with the clerk's name, by his direction, and under his supervision, or afterwards adopted by him, though the manual labor of writing, may be performed by one merely appointed for that purpose. *Ibid*.
6. Where a notice to the sheriff described the execution as having issued against W. M. and W. F. E. but, when produced, it appeared to have issued against W. W. M. and W. F. E., the variance was held to be immaterial. *McRae et al. v. Colclough*. 74.
7. A sheriff who levies an attachment, or writ of execution, should, in a reasonable time thereafter, endorse on the process a *memorandum* of the property

EXECUTION, WRIT OF—CONTINUED.

seized, or, where it consists of so many different articles that they cannot be thus conveniently endorsed, then he should make out an inventory, and file it with the process. *Toulmin v. Lesesne & Edmondson.* 359.

8. Whilst an execution issued from the Circuit Court was in the sheriff's hands, a judgment was obtained against the defendant, and his property levied on and sold by a constable, under an execution issued thereon—held, that the lien created by the delivery of the execution to the sheriff was, under the act of 1828, divested by the levy of the constable. *Jones v. Davis.* 730.
9. Where a sheriff or other officer in the absence of fraud on the part of the purchaser, sells more property than is necessary to satisfy an execution, the sale, as to the excess is not absolutely void; though under *some circumstances*, it may be set aside. *Ibid.*
10. Where an officer is guilty of a breach of good faith in making an excessive levy, or sale under execution, he is liable to an action by the defendant in execution; and perhaps, a party who has been prevented from obtaining satisfaction of a judgment in his favor, may maintain an action against him. *Ibid.*

See Chancery, 28.

See Sheriff, 21.

EXECUTORS AND ADMINISTRATORS.

1. The act of 1806, [Digest 152, s. 2,] which provides that no action shall be commenced against an executor or administrator, in such capacity, until after the expiration of six months from the grant of administration, has no application to the action of detinue; as such an action cannot be instituted against an executor or administrator, in his representative capacity. *Sims v. Canfield, Ex'r of Johnson.* 555.

See Chancery, 55, 56.

See Estates of Deceased Persons, 5.

FERRY.

1. Where a river divides two counties, the Commissioners' Court of either county may establish a ferry over the stream which divides them; which is exclusive of the right of either county to establish another ferry within two miles thereof, unless in the case of a town at or near the ferry so established; in which case, the right exists in either county to establish an additional ferry, if, in the opinion of the Commissioners' Court, the public good demands it, subject only to those restrictions pointed out in the statute. *Jones, et al. v. Johnson.* 746.

FRAUD.

1. Fraud will not be implied from the mere falsity of a representation—it is necessary to shew that the representation was made with a knowledge, by the vendor, that it was untrue, or under circumstances manifesting a recklessness of truth, without knowing whether it was true or false. *Barnett v. Stanton & Pollard.* 182.
2. The mere omission of the seller to disclose a fact within his knowledge, which would materially affect the value of the article, is not a fraud upon the vendee—to make it such, there should be a fraudulent suppression. *Ibid.*
3. A vendee, who would rescind a contract for breach of warranty or fraud, must act with promptness, and take the legal steps for that purpose as soon as the breach or fraud is discovered. If the vendor resides at a distance from the

FRAUD—CONTINUED.

- vendee, an offer to return a chattel, may be made through the medium of the *post office*. *Ibid*.
4. A debtor has the right to prefer one creditor to another ; that the grantor is indebted at the time of making the deed, or that it is made on the eve of judgments being obtained against him, are badges of fraud merely, and do not necessarily render it inoperative. *Williams & Battle v. Jones, Guardian*. 314.
 5. Possession of personal property remaining with the vendor after an absolute sale, is not *fraud per se*, but a badge of fraud merely, casting on the vendee the necessity of showing that the sale is *bona fide*, and was not made with the intent to delay, hinder, or defraud creditors. *Blocker, Administrator v. Burruss*. 354.
 6. At common law, fraud does not constitute a bar to an action upon a specialty. The fraud that avoids a specialty at law, must relate to the *execution of the instrument*. But the jurisdiction of Chancery is much more extensive. *Kennedy's Heirs and Executors v. Kennedy's Heirs*. 571.
 7. When the defendant pleads a payment *puis darrien continuance*, and under that plea, shows the acceptance by the plaintiff, of a certain bill and note in discharge of the action, the contract of payment cannot be impeached for fraud, unless there has been a return, or offer to return, the bill and note received under it. *Barnes v. Bailey & De Bard*. 749.

See Contract, 6.

See Warranty, 1, 2.

FRAUDS, STATUTE OF.

1. It is not permissible to add to, or vary a contract in writing, by parol evidence ; unless the party offering such evidence will lay a ground for its introduction, by the proof of fraud. *Kennedy's Heirs and Executors v. Kennedy's Heirs*. 571.
2. Neither the common law, nor the statute of frauds and perjuries, inhibit the admission of parol evidence to vary, or totally defeat, a written contract tainted with *fraud*. *Ibid*.
3. *Semble*. The statute of frauds was intended to prevent fraud, and not as a cover under which it may be consummated ; and where such a result would follow the non-execution of a contract, equity will enforce, or set it aside, though its terms are not attested by writing. *Ibid*.
4. The Legislature which enacted our statute of frauds, must be presumed to have been cognizant of the construction placed upon the English statute ; and in adopting substantially the terms of that enactment, impliedly approved the judicial interpretation, which it and similar acts had received in England and the United States. *Ibid*. 573.
5. A deed of gift of goods and chattels, where possession remains with the donor, will not under the second section of the statute of frauds, vest a title in the donee, unless it is recorded ; yet, it may be regarded as a parol declaration of the donor's wishes, and to make it operate as a gift, it is necessary to show that the subject was actually delivered. *Myers v. Peek's Administrator*. 648.
6. Where a person has the possession of property, under an agreement with another that he will deliver it to him at a place designated, within a definite period, if the person for whose benefit the delivery was to be made, acquiesces in the failure to comply with the agreement, without seeking to recover the pro-

FRAUDS, STATUTE OF—CONTINUED.

- erty, he must (within the second section of the statute of frauds,) be considered as permitting the possession to remain unchanged. *Ibid.*
7. *Semble.* Where the owner of personal property, voluntarily parts with the possession to another person, either with or without an express contract, there must be a "will or deed," declaring the "loan, reservation, or limitation of use, or property," proved and recorded, as required by the second section of the statute of frauds; or else the absolute property shall be taken to be with the possession in favor of creditors and purchasers. *Ibid.*
 8. The limitation prescribed by the second section of the statute of frauds, vests a complete title in the possessor of personal property, in favor of creditors and purchasers, which cannot be defeated by proof, that the purchaser had notice of the circumstances under which the possession was permitted. *Ibid.*
 9. The son being in possession of personal property belonging to his father, the father executed a deed of gift thereof to the son, reserving to himself by the deed the possession until his death. The donee and the defendant, who was a purchaser from him, retained the possession of the property for more than three years from the time the deed was made. Held, that to entitle the donor to recover, he must show a demand made and pursued by due course of law, or a registration of the deed, upon such acknowledgement or proof as is required by the second section of the statute of frauds. *Oden v. Stubblefield.* 684.

GARNISHEE.

1. A judgment against a garnishee who has not answered, cannot be sustained when the record does not show, either that the garnishee was summoned, that judgment *nisi*, was rendered against him, or a *sci. fa.* made known, nor any other proceeding equivalent to a service. *Jones v. Hart & Bosworth.* 73.
2. A garnishee must be discharged, if no issue is formed on his answer, when he answers that he was once indebted to the defendant by certain notes, three of which are outstanding and unpaid; but as to one, that he was notified by J. E. S. & Co., before the service of the summons, that it was held and owned by them, and on which they had commenced a suit against him; and as to the other two, that he had been notified, since the service of the summons, by C. & A. B., that they were held and owned by them, previous to the service of the summons. *Foster, Nostrand & Co. v. Walker.* 177.
3. A garnishee is not required to determine the validity, or the fact of an assignment. He may state that he has been notified by a holder of the assignment to him of the note, and it rests with the plaintiff to contest the *factum* of the assignment, by an issue under the statute. *Ibid.*
4. The suppletory oath, required by the statute to be made by the plaintiff, before an issue can be had on the answer of a garnishee, may be made by an attorney, agent or factor, *Ibid.*
5. When the answer of a garnishee admits outstanding notes, given to the defendant, but, that notice has been given of their assignment to other parties before the service of the summons, the oath of an attorney in fact of the plaintiff, that he believes the assignment, if any was made, was made subsequently to the service of the summons, is sufficient to put the answer of the garnishee in issue. *Ibid.*
6. Money collected by a sheriff in virtue of an execution, cannot be attached by garnishment, as the property of the plaintiff in the judgment; for while it re-

GARNISHEE—CONTINUED.

- mains in the sheriff's hands it is regarded as in the custody of the law. *Zurcher v. Magee, Sheriff, &c.* 253.
7. A garnishment may be levied on effects in the hands of a trustee of a deed, and if the deed is void in law, the money or effects will be subjected to the payment of the debt. *Hazard, Administrator v. Franklin, Garnishee.* 349.
 8. A garnishment relates to the present time, and money or effects acquired afterwards cannot be subjected to the payment of the debt. *Ibid.*
 9. A trustee will be protected so far as he has *bona fide* disposed of the trust property under the deed, before service of the garnishment, and may retain for a debt due himself. *Ibid.*
 10. A joinder in issue upon the truth of the answer of a garnishee, is a waiver of any previous irregularity. *Ibid.*
 11. On the trial of an issue, made upon the answer of a garnishee, who claimed to hold certain effects of the defendant in execution, by virtue of a conveyance from him, proof of what he said at, and previous to the conveyance, for the purpose of impeaching the transaction as fraudulent, is not admissible, unless the declaration were made in presence of the garnishee. *Jones v. Norris, surviving partner, &c.* 526.
 12. Such illegal evidence cannot be made good by the instruction of the court to the jury that it should not prejudice the garnishee. *Ibid.*
 13. A promissory note or other *chose in action*, cannot be condemned to satisfy the plaintiff's demand. *Ibid.*
 14. Whether in such a case, garnishment should issue against the persons liable to pay such *choses in action*, or whether a bill in Chancery must be filed for that purpose *quere.* *Ibid.*

GIFT.

1. It is essential to a *parol* gift of a chattle, that there should be an *actual delivery* of the thing. *Sims, by her Guardian, v. Sims, Adm'r.* 117.
2. A father, having rescinded a contract which he had made for the sale of a negro woman, belonging to him, called the woman into the yard, and his daughter Mary, (a little girl five or six years old,) to the door of his house, and in the presence of several persons, his daughter and the slave, called on the persons present, to take notice that (the woman) Rachel, was the negro of his daughter; and further, "In presence of you all I give this negro to my daughter, Mary." Previous to that time, the father frequently declared that he intended to give Rachel to his daughter; and afterwards referring to what had taken place at his house in the presence of witnesses, declared that he had thus given her. Held, that the evidence of a gift was incomplete, and that to perfect the daughter's title, the father should have parted with the dominion of the slave in her favor. *Ibid.*
3. A father, by deed, conveyed certain slaves to a trustee, for the use of his daughter during her life, to be hired out, and the monthly or annual proceeds to be paid to her, and at her death the slaves to vest in her children. The daughter married, and the husband took possession of the slaves, and hired them out for a year, taking the note for the hire payable to himself, and transferred it by assignment to one Kernodle; in the month of March of that year his wife died. Held—

First—That as the slaves vested in the children on the death of the mother, the title will draw after it the right to the hire of the slaves after that period.

GIFT—CONTINUED.

Second—That under the statute of this State, the assignee of the husband, though a *bona fide* purchaser, without notice, was in no better situation than his assignor, and affected by all equities which would bind him, and must therefore be considered a trustee for the amount of the hire of the slaves, which accrued after the death of the owner of the life estate. *Lucus, Guardian, &c. v. Kernodle, et al.* 199.

4. Although a deed undertaking to convey property, recites a valuable consideration, as an inducement to its execution, it is, notwithstanding, competent for a creditor of, or purchaser from the grantor, to show, that it was intended as a mere gift. *Myers v. Peek's Adm'r.* 648.
5. A deed of gift of goods and chattels, where possession remains with the donor, will not, under the second section of the statute of frauds, vest a title in the donee, unless it is recorded; yet, it may be regarded as a parol declaration of the donor's wishes, and to make it operate as a gift, it is necessary to show that the subject was actually delivered. *Ibid.*
6. Where a gift has not become complete by the registration of the deed, or the delivery of the thing, an undertaking by the donor to deliver the property at some particular place, is gratuitous, and confers upon the intended donee no legal right. *Ibid.*
7. Where a father delivered a slave to a *friend* for the purpose of effecting a gift to an absent *infant* child, but immediately took the slave into his possession again, and retained the possession of her for several years, until he sold her—employing her as his own property: *Held*, that the delivery was not such an act as divested the father from the dominion or property of the slave, or prevented him from reclaiming her; though the law might be otherwise, if the delivery had been made directly to the child. *Durett v. Sewall.* 669.
8. The son being in possession of personal property belonging to his father, the father executed a deed of gift thereof to the son, reserving to himself by the deed, the possession until his death. The donee and the defendant, who was a purchaser from him, retained the possession of the property for more than three years from the time the deed was made. *Held*, that to entitle the donor to recover, he must show a demand made and pursued by due course of law, or a registration of the deed upon such acknowledgement or proof as is required by the second section of the statute of frauds. *Oden v. Stubblefield.* 684.

See Husband and Wife, 1, 3, 4.

GUARANTY.

1. To charge a guarantor on his letter of credit, it is necessary that he should be notified that the guaranty was accepted, and the credit given, within a reasonable time afterwards; and also, that demand be made of payment of the principal debtor, within a reasonable time after the maturity of the debt, and notice to the guarantor of the failure to pay. *Lawson, et als. v. Townes, Oliver & Co.* 373.

GUARDIAN AND WARD.

1. Infants must, in order to the recovery of their rights, *sue in their own names by their guardians*, instead of making their *guardians principal actors in the cause*; and this is the rule, as well in equity as at law. *Bowie v. Minter, et als.* 406.

GUARDIAN AND WARD—CONTINUED.

2. Where an individual, describing himself as the guardian of certain infants, files a bill *in his own name*, the infants cannot file a supplement thereto, or an original in the nature of a supplemental bill, which shall give them the advantage of the suit commenced by their guardian; and though one of the infants, who is a female, marry, herself and husband cannot file a *bill of revivor and supplement*, because she was not a party to the original cause. *Ibid.* 407.
3. A bill filed by infants on attaining their majority, or marriage, which refers to one filed by their guardian, *in his own name*, while they were in wardship, but does not recite its substance, will not authorize a decree in their favor, such as the guardian himself sought. *Ibid.*

See *Chancery*, 37.

See *Orphans' Court*, 1.

HUSBAND AND WIFE.

1. A gift or bequest to a *married woman and her children, born and thereafter to be born*, does not invest her with an estate *to her sole and separate use*, independent of the marital rights of her husband. *Dunn & Wife, et al. v. The Bank of Mobile, et al.* 152.
2. A bequest to a married woman and her children, born and thereafter to be born, makes them tenants in common—joint-tenancy and its consequences being abolished in this State. *Ibid.*
3. If the right of the husband has vested, by his possession of property given to his wife and children jointly, the share of the wife may be levied on by an execution against the husband; but the children may, by suit in equity, enjoin proceedings upon the execution until partition is made, &c. *Ibid.*
4. *Semble*—If the marital rights of the husband have not attached upon property given to the wife, the latter may apply to equity to prevent the husband from obtaining the possession until he makes a suitable settlement upon her. *Ibid.*
5. In an action brought to recover damages for an assault and battery, by the wife of the defendant on the wife of the plaintiff, the admissions of the wife of the former cannot be given in evidence to charge her husband. *Hussey & Wife v. Elrod & Wife.* 339.

See ———, 17, 18.

INDICTMENT.

1. In an indictment founded upon a statute introductive of a new offence, it is sufficient to describe the offence in the terms of the act. *The State v. Click.* 26.
2. The reversal of a judgment of the Circuit Court, in a criminal case, upon points referred as novel and difficult, does not make it necessary that the accused should be indicted anew, when the cause is sent back for another trial, unless the indictment was adjudged insufficient. *The State v. Hughes.* 102.

See *Statute*, 27.

INDORSER AND INDORSEE.

1. The return by the sheriff of *no property* to an execution, at the suit of the indorsee against the maker of a promissory note, is conclusive to fix the liability of the indorser, when the other requisitions of the statute have been complied with. And such return may be made at any time after the reception of the execution by the sheriff, who is liable to the indorser if the return is falsely made. *Reese v. White.* 306.

INDORSER AND INDORSEE—CONTINUED.

2. If the payee of a note or bill, or any person whose name appears thereon previous to the last indorser, offer it to a bank to be discounted, for his benefit, the transaction on its face imports, that the last indorsement was made to enable the offerer to raise money by its negotiation. *Mauldin v. The Branch Bank at Mobile*. 503.
3. An indorser is not a surety within the meaning of the act for the relief of securities, Aik. Dig. 385, nor entitled to the benefit of the 6th section of that law; although such indorsement was made for the accommodation of the maker of the note. *Bates v. The Branch Bank at Mobile*. 689.
4. An indorsee of a note instituted suit against the maker to the County Court of the county in which he resided, and which was the first court after the maturity of the note, which writ was returned *not found*, whereupon he dismissed the suit and commenced anew to the next court held for the county, which was the Circuit Court; obtained judgment and return by the Sheriff of no property found—Held, that in a suit by the indorsee against the indorser a declaration alledging these facts was good. *Person v. Mitchell*. 736.

See Partner and Partnership, 12, 13.

INFANT.

1. A decree against infants need not prescribe a time within which they may impeach it after attaining their majority—the statute ascertains the time, and it need not be repeated in the decree. *Kennedy's Heirs and Executors v. Kennedy's Heirs*. 574.

INTEREST.

1. The defendant made his promissory note, by which about twenty-seven months after date he promised to pay to plaintiff, as attorney, &c., of the Connecticut Asylum, &c., "at Hartford, for the education and instruction of the deaf and dumb, the sum of three thousand three hundred and thirty-nine dollars and eighteen cents, at the Mechanics' Bank, in the city of New York, with lawful interest from the date till paid, (but if the principal sum shall be punctually paid when due, then, in that case, and not otherwise, the interest is to be deducted,) value received, Tuscaloosa, State of Alabama, 3d February, 1841." Held, that the fair intendment is, that the contract, which occasioned the making of the note, required the payment of interest from its date, but the high rate of exchange (of which the history of the times afford ample evidence,) on the North Eastern cities, and the risk in effecting a remittance thither, induced the payee to agree to remit the interest, if payment was promptly made. And the defendant not having paid the principal at maturity, was liable to pay interest from the date of the note. *Ely, use, &c. v. Witherspoon*. 131.

JUDGE DE FACTO,

1. The official acts of a Judge *de facto*, whose title to the office has not been adjudged insufficient, are valid and irreversible. *Mayo, et als. v. Stoneum, Ex'r, &c.* 390.

JUDGMENT AND DECREE.

1. Where it appears that the defendant confessed a judgment, but the *consideratum est per curiam* is, that the plaintiff recover of the defendants "the sum so assessed, as aforesaid," &c.; the term "*assessed*," will mean nothing less than "confessed." *McMahan & Evans v. Colclough*. 68.

JUDGMENT AND DECREE—CONTINUED.

2. When a judge fails, or even refuses, to sign the minutes of the court over which he presides, this does not invalidate the record; the fifteenth section of the act of 1819, Aikin's Digest, 245, s. 28, is merely directory to the judge. *Bartlett & Waring v. Lang's adm'rs.* 161.
3. The proceedings and judgment of a court of a sister State were certified by the clerk and attested by the presiding judge; the proceedings were in form such as are had in courts of record, and the declaration was such as is usual, where the cause of action is an exemplification of the judgment of a court of record of a sister State. Held, that it would be intended, without further proof, that the court rendering the judgment, is a court of record—the plea not putting that fact in issue, but denying the existence of such a record as the plaintiff alledged. *Hughes v. Harris.* 269.
4. When the judgment entry shows that the parties appeared, and there is a finding by the jury, this court will presume it was on a proper issue, although no plea appears in the record. *Lucas v. Hitchcock.* 287.
5. When the judgment entry shows that the parties appeared, and the jury found for the defendant, and assessed damages in his favor, over and above the claim of the plaintiff, and the court renders judgment in his favor for that amount, although no plea appears in the record, the judgment will be supported; it being a more reasonable presumption, that a plea was once filed, than that no plea ever existed in the cause, on which such a finding could be made. *Ibid.*
6. When a judgment assumes to be founded on an award, neither the cause of action, indorsed on the writ, nor that disclosed by the declaration will be looked to, to support it. To sustain such a judgment, the order of reference must be shewn by the record. *Halsill v. Massey.* 300.
7. Where a power of attorney was copied at length into the transcript of the record, authorizing the confession of a judgment, but was not by order of court, or otherwise, made a part of the record, it cannot be regarded as such on error. *Hodges & Puckett v. Ashurst & Sons.* 301.
8. It is competent for a court, having jurisdiction of the subject matter, to receive the confession of a judgment, though no suit had been commenced. *Ibid.*

See Garnishee, 1.

See Chancery, 30.

See Verdict, 8.

JURY.

See Criminal Cases and Proceedings in, 13.

LEX LOCI AND LEX FORI.

1. The courts of one State cannot judicially know what are the laws of another. If, therefore, the *lex loci contractus* dispensed with the necessity of demand and notice, it should be alledged in the pleadings, that it may be proved if denied. *Mims v. The Central Bank of Georgia.* 294.
2. The common law of the State being derived from a common source, in the absence of proof to the contrary, it will be presumed to be the same in all.—*Ibid.*
3. The time within which suits may be brought, or the mode in which they shall be instituted, relate to the remedy, and do not affect the obligation of a contract—therefore, where, by the act of incorporation of a bank in Georgia, the bank was permitted to join separate indorsers in the same action, if the bank

LEX LOCI AND LEX FORI—CONTINUED.

- sue in this State, on a note made to it in the State of Georgia, it must bring separate suits—such being the law of this State. *Givens and Herndon v. The Western Bank of Georgia.* 397.
4. The courts of this State will give effect to a contract, according to the law of the place where it is to be performed, unless it violates some law of the *lex fori*, or comes in contact with the established policy of the country; but the *remedy* is governed by the law of the *lex fori.* *Ibid.*
 5. Every indorsement is a new contract, the rights and liabilities growing out of which, are to be ascertained by the law of the place where the indorsement is made. *Ibid.*

LIEN.

1. Whilst an execution issued from the Circuit Court was in the sheriff's hands, a judgment was obtained against the defendant, and his property levied on and sold by a constable, under an execution issued thereon—held, that the lien created by the delivery of the execution to the sheriff was, under the act of 1828, divested by the levy of the constable. *Jones v. Davis.* 730.
2. When a bond is taken by the sheriff, conditioned to detain the steam boat seized, if judgment of condemnation shall be given and execution issue, this is not a compliance with the statute; nor is the lien upon the boat discharged. The court may, notwithstanding, proceed to condemnation of the boat, and order its sale. *Bierne & McMahon v. The Steamboat Triumph.* 738.

LIMITATIONS, STATUTE OF.

1. When several promissory notes are secured by mortgage on lands, and the mortgagor devises a portion, and sells the remainder of the mortgaged lands, and dies, the remedy on the mortgage is not barred; although the holder of the notes omits to present them for payment, to the personal representative of the deceased mortgagor, within eighteen months; and is, by such omission, barred of his remedy against such personal representative. And there is no distinction between the case of a mortgagee, in or out of possession of the mortgaged premises. *Inge, et als. v. Boardman.* 331.
2. In defence of a bill to redeem, it is not necessary for the defendant to plead or insist on the statute of limitations, if the complainant in his bill, or by evidence in support of it, shews that he has no subsisting title. *Sims v. Canfield, Ex'r of Johnson.* 555.
3. When slaves have been passed under a claim of title for a period analagous to the statute of limitations, the possession operates not only as a bar, but also invests the possessor with the absolute property. *Ibid.*
4. The action of detinue is the only one at law analagous to a bill to redeem a specific chattel; and so far as the statute of limitations can have any bearing on such a bill, it is to be considered precisely as if it was an action of detinue at law. *Ibid.*

See Mortgage, 14, 15.

MANDAMUS.

1. If a Chancellor refuses to proceed according to the mandate of the Supreme Court, in a cause in which his decree has been reversed, and the proper decree rendered by the Supreme Court, the proper mode to arrive at the justice of the case, is to require him to proceed by writ of mandamus. *Johnson, et al. v. Glasscock, et al.* 519.

MANDAMUS—CONTINUED.

2. A peremptory writ will not, however, be issued in the first instance on petition ; but only a rule on the Chancellor to shew cause why the writ should not issue. *Ibid.*
3. When the direction contained in a mandate of this court, is precise and unambiguous, it is the duty of the subordinate court to carry it into execution. And it ought not to decline obedience upon a supposition that the court has inadvertently or otherwise committed an error. *Ibid.*

MORTGAGE.

1. In a case where the defendants are adults, it is not error to decree a sale of mortgaged premises, without first ascertaining by the report of a Master, whether the amount due might not have been raised by the sale of a part of the mortgaged premises ; unless it be suggested that such a reference is proper. *Tickner v. Leavens' Ex'r.* 149.
2. In the case of a debt secured by a mortgage on property, the debt is the principal, and the mortgage merely an incident—an assignment of the debt therefore, is an assignment of the mortgage also, unless otherwise expressed in the transfer. *Emanuel & Gaines v. Hunt.* 190.
3. An allegation in a bill, that the note was assigned, is equivalent to an allegation that the mortgage was assigned also. *Ibid.*
4. When property is sold under a decree foreclosing a mortgage, and the property is purchased by the mortgagee, the biddings will be opened and a re-sale ordered before the confirmation of the sale, if an advance of not less than ten per cent. on the former sale is offered, and the money deposited in Court ; but no re-sale will be ordered, when the deposit is less than two hundred dollars. *Littell v. Zuntz.* 256.
5. When the property is purchased by a stranger, the sale will not be set aside for mere inadequacy of price, no matter how gross, unless there be some unfair practice at the sale, or unless there is surprise without fault on the part of those interested, and in no case of this description, after confirmation of the sale, unless fraud can be imputed to the purchaser, which was unknown at the time of the confirmation. *Ibid.*
6. When a sale is thus set aside, the purchaser cannot be charged with rent, unless he has actually received it, and will be entitled to a return of the purchase money with interest, all sums laid out in improvements, his costs and expenses and a liberal allowance for his trouble. *Ibid.*
7. The prevalence of Yellow Fever at the time of the sale, which, by causing the removal of a great portion of the population, and the suspension of business, prevented fair competition, held a sufficient excuse for the absence of the party interested from the sale, and the property having sold greatly below its value, a sufficient reason for setting aside the sale and ordering a re-sale of the premises. *Ibid.* 257.
8. When a bill is filed to foreclose a mortgage, the personal representative of the deceased mortgagor is not a necessary party. Those only who are entitled to the equity of redemption are necessary parties. *Inge, et als. v. Boardman.* 331.
9. When the record, in a suit to foreclose a mortgage, shews that the notes and a copy of the mortgage, were used in evidence at the hearing, it will be presumed

MORTGAGE—CONTINUED.

- in the absence of exceptions, that the proper proof was made, and the objection comes too late in an appellate court. *Ibid.*
10. A decree for a foreclosure and sale of mortgaged premises, is not erroneous, because it does not *expressly* require the master to report his proceedings to the court, but directs him to make a deed to the purchaser. *Cullum, et al. v. Batre's Ex'rs.* 415.
 11. The distinction between a pledge and a mortgage of personal estate is, that in the former, the title is retained by the pledgor; but, in the latter, it passes to the mortgagee, subject to be divested if the condition of the mortgage is performed. *Sims v. Canfield, Ex'r of Johnson.* 555.
 12. It is yet an open question in this State, whether the mortgagor, after a default in the condition of the mortgage, can divest the legal title of the mortgagee then in actual possession, so as to entitle the former to maintain trover or detinue against the latter. *Ibid.*
 13. But if it is admitted that trover or detinue, under such circumstances, will lie, Chancery, notwithstanding, has jurisdiction of a bill filed by the mortgagor to redeem a mortgaged slave. *Ibid.*
 14. A bill shows the mortgage of a slave the 29th June, 1839, to secure a sum of money to be paid in two months. The mortgagee took peaceable possession of the slave in October of the same year, and held it under claim of title until his death, when it passed to his executor, and they together held it for more than six years previous to suit commenced. *Held*, that the claim of the mortgagor was extinguished by lapse of time; and that the title of the mortgagee had become indefeasible. *Ibid.*
 15. When possession of the mortgaged slave is retained by the mortgagor until the default in the condition, the statute does not commence running until the mortgagee acquires actual possession of the slave. *Ibid.*

See Chancery, 33, 34, 35, 36, 37.

NOTARY PUBLIC.

1. The release of a debt, or unliquidated demand, is not proved by the certificate of a notary public under his notarial seal, certifying that the same was acknowledged by the party executing it; and the rule of the common law, which excludes such evidence, is not varied by the act of 1803, "concerning notaries public," unless perhaps it be shown that such an instrument is "commonly proved or acknowledged before notaries within the United States." *Hill v. Norris.* 640.

OFFICERS AND PROCEEDINGS AGAINST.

1. Wherever the constitution provides for the election of any civil officer, by the people, the right to exercise the office is derived from the election, and the commission issued by the Governor, is only evidence of the right. If one is commissioned who has no right, he exercises the franchise without authority, and it may be resumed by the State, when its judicial tribunals have ascertained the fact of usurpation in the mode prescribed by law. *Wammack v. Holloway.* 31.
2. The right to exercise an office is as much a species of property as any other thing capable of possession; and to wrongfully deprive one of it, or unjustly withhold it, is an injury which the law can redress in as ample a manner as as any other wrong; and conflicting claims to exercise it, must be decided in

OFFICERS AND PROCEEDINGS AGAINST—CONTINUED.

the same manner as other claims involving any other right, if either of the claimants insists on a trial by jury. *Ibid.*

See Statute, 3.

See Statute 4, 5.

See Execution, Writ of, 9, 10.

ORPHANS' COURT.

1. The Judges of the County Courts of this State have no authority to appoint guardians, either for the persons or estates of minors, whose fathers are living. *Hall v. Lay.* 529.
2. Since the creation of separate Chancery Courts, a cause cannot be transferred from the Orphans' Court to the Circuit Court, but it seems, in such a case, Chancery would have jurisdiction. *The Heirs of Bond v. Smith, Administrator.* 660.

PARTNERS AND PARTNERSHIPS.

1. J. & H. in Mobile, and S. & S. in Tuscaloosa, were joint owners of a steam boat, and had been engaged in running it as a general freighter, between Mobile and Tuscaloosa. S. & S., without the knowledge of J. & H., sold their interest to H. & D., who were the former Captain and Clerk of the boat, and shipped on board the boat, one hundred bales of cotton for Mobile—on the downward passage the boat was sunk and the cotton lost—held, that although a stranger could recover from J. & H. for a loss caused by negligence or want of skill, notwithstanding the sale of the interest of S. & S., that that S. & S. could not, without proof that J. & H. either expressly or by implication, consented to run the boat for freight, in partnership with the new joint owners. *Jones, et al. v. Scott.* 58.
2. One joint owner of a steamboat may sell his interest in the boat, without the assent of the other proprietors, and the purchaser will become a tenant in common with the other joint owners. *Ibid.*
3. The act of February, 1839, which authorizes an action to be brought against the representatives of a deceased partner, upon an affidavit being made, that the survivor is insolvent, &c., as it merely gives a remedy at law, in a case in which the remedy was in equity, without any interference with the right, operates retrospectively, so as to embrace liabilities incurred previous to its passage. *Bartlett & Waring v. Lang, Adm'rx.* 401.
4. General reputation cannot be given in evidence, to establish the existence of a co-partnership between individuals. *Carter, Hogan and Plowman v. Douglass.* 499.
5. A partnership is bound for the acts of each of the partners, (done in the name and apparently on account of the firm,) while it is supposed to exist; and to relieve themselves from this responsibility, they must give a reasonable notice, that they are no longer partners. *Mauldin v. The Branch Bank at Mobile.* 502.
6. In respect to all persons who have had no previous dealings with the firm, a constructive or implied notice is sufficient. This is usually given by advertisement in a newspaper, published at the place where the firm was established, if any, if none, then in a paper published convenient thereto; and some-

PARTNERS AND PARTNERSHIPS—CONTINUED.

times, for the greater caution, in a paper published at a point where the firm had been accustomed to do business. *Ibid.*

7. As it respects persons having previous dealings with the firm, notice of dissolution must be specially addressed, or personally communicated to them. This rule, however, has sometimes been so far relaxed, as to allow circumstances to be proved for the consideration of a jury, from which they may infer that personal notice was received. *Ibid.*
8. In regard to notice of dissolution, it is sufficient, if the severance of the partnership is made as notorious as the partnership itself; and as one partnership may be more extensively known than another, it follows, that the same degree of publicity is not necessary to inform the world of the severance of every firm. *Ibid.*
9. The reasonableness of notice of the dissolution of a partnership, is a mixed question of law and fact, to be submitted to a jury, for their decision, under the direction of the court. *Ibid.*
10. Notice of the dissolution of a partnership, published in one of the usual advertising Gazettes of the place where the business was carried on, and in a fair usual manner, is not only presumptive, but conclusive evidence of notice. *Ibid.*
11. A party receiving a security in the firm name, after dissolution, may for the purpose of showing that notice had not been sufficiently diffused, prove that the partnership was more extensively known than the jury would be warranted in inferring from the nature of its business. *Ibid.*
12. One partner cannot, without the assent of his co-partner, give a security in the firm name, for the payment of his individual debt; nor can he without such assent lend the partnership name as a surety, indorser or guarantor for a third person, *Ibid.*
13. A person receiving such security from an individual partner, could not recover, because he would be *particeps doli*; yet, if the paper were of such a character as to be subject to the law merchant, an innocent indorsee, acquiring it in the usual course of trade, might maintain an action against the partnership. *Ibid.* 503.
14. The burthen of proving the assent of the co-partners, to the use of the partnership name by one of the partners, lies upon the person taking the security. *Ibid.*
15. Where the writ describes the defendants as partners, and is returned executed *generally*, or on either of them, the *prima facie* intendment, according to the practice under the statute of 1818 is, that the defendants are partners, and the service of process is sufficient to bring them all before the Court. *Fowlkes & Co. v. Baldwin, Kent & Co.* 705.
16. *Semble.* If a judgment is rendered against a party who is not a partner, and who was not served with process, it will be competent for a court of equity to perpetually enjoin its recovery. *Ibid.*
17. Where one of several defendants sued on a promissory note as partners, proposes to show, that he was not a partner, he must interpose a plea supported by affidavit, which puts in issue the making or adoption of the note by him.—*Ibid.*

PENALTY.

1. Where articles covenant for the performance of several things, and stipulate for the payment of a sum in gross, in the event of a breach, the sum expressed will be regarded a penalty ; and, if the parties would stipulate the damages in such a case, they should express the sum to be paid upon each distinct breach. *Watt's Ex'rs v. Sheppard.* 425.
2. Where a large sum is agreed to be paid, upon the non-payment of a smaller, sum; or the non-performance of a duty, the damages resulting from which may be ascertained with reasonable certainty, and which is much less than the sum expressed, that sum will be a penalty. *Ibid.*
3. Where the damages resulting from a breach of contract are certain, and the sum expressed in one event would be too small, and in another too large, it cannot be considered liquidated damages. *Ibid.* 426.
4. The terms "penal sum"—"liquidated damages," &c. are not conclusive to show the true character of the sum agreed to be paid in the event of non-performance of a contract. *Ibid.*
5. It is permissible to show by proof, the value of property agreed to be conveyed, or delivered ; and the consideration moving from the other party therefor, as criteria by which to ascertain, whether a sum agreed to be paid upon default, is a penalty, or liquidated damages. *Ibid.*
6. A party undertook to make a title to a large tract of land, and upon a failure to comply with his contract, either in whole or in part, agreed to pay to the obligee the sum of ten thousand dollars, as stipulated damages. This sum was about the value of the entire tract, at the time the contract was entered into ; the obligee received a title for part of the land, and sought to recover the sum stipulated, for failing to perfect title to the residue—Held, that the obligee might have refused a title to a part, until it was completed to all ; but, having received it, he could not recover as for an entire breach—if ten thousand dollars was a fair estimate for a failure to convey all the land, it was too much for a part. *Ibid.*

See Damages, 5, 8.

PLEADING.

1. A plea of freehold and permanent residence in the county, other than that where the suit was commenced, is good as a plea in abatement when it states the facts which authorize an exemption from suit in that county, although it begins and concludes as a plea to the jurisdiction, but does not set out the proper jurisdiction in affirmative terms. *Prim and Abbot v. Davis.* 24.
2. It is not essential that a plea in abatement should be verified by the oath of the defendant, or that it should be signed by him ; its truth may be shown by the affidavit of another person ; and it may be signed by counsel. *Ibid.*
3. If an action of debt can properly be maintained on a bail bond, it does not follow that the action is local ; such an action is liable to be abated on the plea of the defendant if he is not sued in the proper county. *Ibid.*
4. The plea of *non-claim within eighteen months*, pleaded to a suit brought within less than six months after the liability accrued, is a nullity. *Evans' Adm'r v. Steel.* 114.
5. The plea of the statute of limitations to a suit, brought within less than six months after the liability accrued, is a nullity. *Ibid.*

PLEADING—CONTINUED.

6. In an action against the indorser of a promissory note, the declaration should alledge a demand, refusal and notice, or something equivalent. *Mims v. The Central Bank of Georgia*. 294.
7. Where a defendant pleads an affirmative plea, the *onus* of proving which lies upon himself, the most regular course would be to reply, or demur to it; yet, if the defendant does not appear to sustain his plea, and a judgment by default is rendered in favor of the plaintiff, it will not be reversed on error; for the irregularity was one from which no injury resulted. *Dougherty v. Colquitt*, use, &c. 337.
8. Where the declaration sets out a legal liability, and avers a subsequent promise to pay "on request," such an averment will be regarded as a mere consequence of the cause of action disclosed, and the declaration will be good, though it is not alledged that a *request* was made. *Henderson v. Howard, Copeland & Co.* 342.
9. When the liability of the defendant depends on notice of a particular fact, such notice must be specially averred, and the general averment, "of all which the defendant had notice," at the close of the declaration, will not be sufficient on demurrer, though it would be aided by verdict. *Lawson, et als. v. Townes, Oliver & Co.* 373.
10. An allegation in the declaration, of the time when the credit was given, is not a description of the note, and will not authorize the rejection of the note, the date being different from the alledged date of the credit. *Ibid.*
11. The plea of the statute of non-claim, must be pleaded specially. The facts which, under that plea, may be given in evidence, cannot be available to an executor or administrator, under the general issue. *The Adm'rs of Mardis v. Smith*. 382.
12. The declaration states that the note sued on, was made in "Kemper County, Mississippi;" held that the meaning of the averment was, that the note was made in the State of Mississippi, and as it must be held to be there payable, unless shown to be payable elsewhere, it was error to take judgment by default, and compute the damages without proof of the rate of interest of the State of Mississippi. *Dunn v. Clement*. 392.
13. In proceeding on a penal bond, the plaintiff may declare for the penalty; or, under the act of 1824, "regulating proceedings on pental bonds," he may set out the condition, either in whole or in part, and assign one or more breaches; or, if the defendant puts in a plea, which does not tender an issue, he may assign breaches in his replication: and, where judgment is rendered for the plaintiff on demurrer, or by default, if he has not previously assigned breaches, he may suggest them on the roll. *Watt's Ex'rs v. Sheppard*. 425.
14. If the declaration be substantially defective in the assignment of breaches, the plaintiff will not be allowed to strike them out after demurrer, on the ground that the declaration is good without them. *Ibid.*
15. In assigning breaches, it is sufficient to state the intention of the parties, as it may be collected from the entire instrument, without using the precise terms in which the intention is expressed. *Ibid.*
16. A breach must be so assigned as to show, that the contract has been broken, and that the plaintiff has a cause of action. *Ibid.*

PLEADING—CONTINUED.

17. It is not necessary that the breach assigned, should negative the performance of the defendant's contract *in toto*; if it has been performed in part, it is enough to aver a non-performance as to the residue. *Ibid.*
18. Where several breaches are assigned if the defendant demurs to the whole, if one be good, the declaration will not be held ill; the correct practice is, to demur to the breaches severally, or only to such as are defective. *Ibid.*
19. In the assignment of breaches, the plaintiff should not go beyond the defendant's contract, so as to make it uncertain whether it has been broken; yet surplusage furnishes no ground for demurrer. *Ibid.*
20. A plea recited certain rules and regulations of the State Bank, proposing to make advances on cotton, on certain terms and conditions, particularly set forth in the rules and regulations—that pursuant thereto, one Major Cook, pretending to act as agent of the bank, advanced to the defendant, Bates, seventy-nine thousand six hundred and thirty-two dollars, and received from him one thousand and twenty-two bales of cotton; that thereupon the said Cook executed a receipt, or statement setting forth the receipt of the cotton, and advance of the money aforesaid, under the rules and regulations aforesaid; whereupon, the defendants executed the bill of exchange sued on, and fifteen others, amounting in all to the sum of money advanced, which were delivered to the said Cook; then follows an averment that the said sum of money was received for, and on account of, the cotton so delivered, and not for, or on account of the said bills of exchange; but that the bills of exchange were to be held by the bank, for the purpose of securing to it the payment of such sums as the nett proceeds of the cotton, when sold, might be less than the sum of money advanced upon it: Held—
 First—That this last averment of the plea was not the averment of an independent fact unconnected with the rest of the plea; but was a conclusion of the pleader from the facts previously averred.
 Second—That, if it was considered as a separate averment, unconnected with the preceding averments, then the plea would be bad, as it would offer two distinct issues of fact; one upon a contract made pursuant to, and by authority derived from, the "rules and regulations of the bank;" and another on a contract made without reference to these rules and regulations.
 Third—That the plea did not question the regularity of the appointment of Cook, but impliedly affirmed it.
 Fourth—The contract described in the plea, is not a dealing in "goods, wares and merchandise," within the meaning of the prohibition, contained in the 20th section of the charter of the bank. *Bates & Hines v. The Bank of the State of Alabama.* 451.
21. The plea is demurrable, because if issue were taken on it, it would admit the introduction of parol testimony, to contradict the legal effect of the contract. *Ibid.* 452.
22. The act of 1811, which requires that the execution of a writing sued on shall only be denied by plea, supported by the affidavit of the defendant, does not prescribe a plea different in form, from what was proper at common law, to throw upon the plaintiff the *onus* of proving the genuineness of the writing. *Mauldin v. The Branch Bank of Mobile.* 502.

PLEADING—CONTINUED.

23. In proceedings, at the suit of a bank, by notice and motion, special pleading is dispensed with. Although the plea of *non-assumpsit*, supported by affidavit, would put in issue the fact, whether an indorsement was made by the party sued; yet, an indorser may interpose a formal denial tendering an issue, accompanied by an affidavit; and in a summary proceeding this will be regular. *Ibid.*
24. Where a defendant pleads in *bar*, he cannot object, on the trial before a jury, that the writ bears test before the cause of action accrued. Such objection is good on plea in abatement. *Jones v. Yarborough.* 524.
25. A note which, on its face, is made negotiable and payable at the Branch of the Bank of the State of Alabama, at Mobile, cannot be given in evidence, under a declaration describing a note as payable generally. *Pucket v. King, Upson & Co.* 570.
26. After plea, pleaded in an action of trespass to try title, no objection can be taken to the declaration, either for form or substance, unless the insufficient description is carried into the verdict and judgment. *Ware v. Bradford.* 676.
27. Where one of several defendants sued on a promissory note as partners, proposes to show, that he was not a partner, he must interpose a plea supported by affidavit, which puts in issue the making or adoption of the note by him.—*Fowlkes & Co. v. Baldwin, Kent & Co.* 705.
28. A plea which denies that the writing declared on, is the defendant's act *in law*, or insists that it was not intended to impose any legal objection or duty upon upon him, must be verified by affidavit; *aliter*, where a mere legal question is raised upon an inspection of the paper, whether the defendant is personally responsible. *Lazarus, use, &c. v. Shearer.* 718.

See Bail, 4.

PRACTICE.

1. A judgment may be amended *nunc pro tunc* at a succeeding term of the court, if there be sufficient evidence to amend by. *Brown v. Bartlett.* 29.
2. The word "dismissed," found opposite the case on the docket of the judge, in his hand writing, will not of itself be sufficient to authorize an amendment of the judgment at a succeeding term, so as to make the defendant liable for costs. *Ibid.*
3. A writ of error is not the proper mode for the removal of a cause from a court of revenue and roads, to a superior tribunal. Where a new jurisdiction is created by statute, and the court exercising it, proceeds in a summary method, or in a course different from the common law, a *certiorari* is the appropriate remedy. *Ex parte Tarlton.* 35.
4. A resident, who is served with process within the county of his residence, cannot properly be sued in another county, unless he is sued jointly with some other person, jointly liable; and in such a case, the appropriate indorsement must be made on the writ as required by the statute, or the suit may be abated on plea. *Deforest, Morris & Wilkins v. Elkins.* 50.
5. When an interlocutory judgment by default, has been irregularly taken in an attachment suit against non-resident defendants, if they afterwards appear and plead to issue, the irregularity will be considered as waived, and is not a

PRACTICE—CONTINUED.

- sufficient reason for the reversal of a judgment obtained against them on verdict. *Corley and others v. Shropshire.* 66.
6. Where there is more than one representative of a deceased person, the writ must be served on all; but, if one resides out of the State, he need not be sued. *J. H. & L. S. Owen v. Brown.* 126.
 7. When one becomes a party to a suit, as the administrator of him by whom it was instituted, it is unnecessary to set out the letters of administration; as the defendant in such a case, is presumed to be always before the court, and has the opportunity to controvert the right of the person offered to become a party, when he is proposed as such. *Innerarity v. Frowner.* 150.
 8. When a suit is continued, and the continuance entered of record, the parties are then discharged from attendance until the next term. It is erroneous afterwards, and during the same term, to proceed to final judgment. *Ibid.*
 9. The clerk of the court is the proper custodian of its records; and full credence is to be given to his official act in certifying them. If there should be reason to suppose that mistakes or omissions have been made in completing any record, it is within the power of the proper court to rectify them, and place the record in its proper condition. *Bartlett & Waring v. Lang's Administrators.* 161.
 10. Where an issue, on the plea of *nul tiel record*, is tried by a jury, instead of the court, without objection from the unsuccessful party, he cannot, on error, object to the irregularity. *Hughes v. Harris.* 269.
 11. When a plea is offered after the pleadings are made up, its acceptance or rejection is a matter of discretion with the court, and will not be reviewed. *Hill v. Bishop.* 320.
 12. A continuance and its terms is also a matter of discretion, which will not be reviewed. *Ibid.*
 13. *Seemle*—That where a judgment recites, "the plaintiff came by his attorney, and the defendants say nothing in bar or preclusion of this suit," &c., it will be presumed the pleas found in the record were waived. *Dougherty v. Colquitt, use, &c.* 337.
 14. Where an action is founded upon a bill of exchange, the bill and the protest are not necessary parts of the record, but can only become such by bill of exceptions. *Henderson v. Howard, Copeland & Co.* 342.
 15. In an action against the drawer or an indorser of a bill of exchange, a final judgment may be rendered by default against the defendant. *Ibid.*
 16. If the plaintiff in error fails to file a transcript at the term to which the writ is returnable, he may sue out a second writ of error any time before the affirmance of judgment on certificate, and a motion to affirm for a failure to prosecute the first writ, will not be entertained after the case is brought up by the second. *Roebuck v. Duprey.* 352.
 17. An objection that a question is leading, must be made at the time it is proposed, and if not then made, will not be entertained; and such is the law even where a deposition is objected to, for that cause. *Towns & O'Brien v. Alford & Butler.* 379.
 18. The correct practice under the statute, which authorizes writs issued upon a joint cause of action, to be executed in different counties, in which the parties against whom they issue, respectively reside, is, to make the writ sent to another.

PRACTICE—CONTINUED.

- er county for service, a counterpart of that which is to be executed in the county where it is returnable, indorsing thereon the identity of the cause of action. *Mayo et als. v. Stoneum, Ex'r, &c.* 390.
19. It has been often adjudged, that it is not permissible to go behind the declaration, and reverse a judgment for errors in the initiatory process. *Ibid.*
20. Where the defendant pleads to the declaration, and the cause is submitted to the jury upon issues of fact, the court should not exclude evidence which tends to sustain the issues, on the part of the plaintiff, because the declaration does not disclose a good cause of action. *Bartlett & Waring v. Lang's Adm'rx.* 401.
21. After plea, pleaded in action of trespass to try title, no objection can be taken to the declaration, either for form or substance, unless the insufficient description is carried into the verdict and judgment. *Ware v. Bradford.* 676.
22. When the bill in a Chancery cause is lost or abstracted from the files, another may be substituted, but if this is not done, no decree can be rendered in favor of the complainant, but the suit must be dismissed. *Glover v. Rainey.* 727.

See Pleading, 1, 2, 3.

See Appeals and Certiorari, 2.

See Garnishee, 2, 3, 4, 5.

See Witness, 3.

See Court, Supreme, 2, 3.

See Judgment and Decree, 4, 5.

See Appeals and Certiorari, 4.

See Garnishee, 10.

See Court, Supreme, 4.

See Witness, 8.

See Appeals and Certiorari, 5, 6, 7.

See Court, Supreme, 5.

See Amendment, 2.

See Partners and Partnerships, 15.

PRINCIPAL AND AGENT.

1. A bank may appoint an agent to transact any business which it may lawfully do; and such appointment may be made by a mere corporate vote. *Bates & Hines v. The Bank of the State of Alabama.* 452.
2. In order to make a written contract made by an agent, binding on the principal *per se*, it should appear to have been made in the name of the latter; but the form of the signature is unimportant. *Lazarus, use, &c. v. Shearer.* 718.
3. When it is doubtful from the face of a contract, whether it was intended to operate as the personal engagement of the party signing it, or to impose an obligation upon some third person as his principal, parol evidence is admissible to show the true character of the transaction; the more especially, if the right of a *bona fide* indorser without notice is not concerned. *Ibid.*
4. An authority to the President of a corporation "to make all contracts, and draw on the Treasurer for all disbursements (countersigned by the Secretary,) under the direction of the board," does not authorize him to accept a bill without "the direction of the board." *Ibid.*

PRINCIPAL AND AGENT—CONTINUED.

5. Where the acts of one person as the agent of another, are ratified by the principal as being done for him, it will be presumed that the agent acted under a legal authority. *Ibid.*
6. Although the principal becomes liable by the adoption of a contract made on his behalf, the agent is not discharged, unless he show, that the act was done in the exercise, and within the limits of the powers delegated, or, in other words, under a sufficient authority existing *at the time* the contract was made. *Ibid.*
7. Where an agent makes a contract in writing, on which he is *prima facie* liable, he may be sued thereon; and it is not necessary to bring a special action on the case against him for having exceeded his authority. *Ibid.*

PROCESS.

See Practice, 18.

QUO WARRANTO.

1. The refusal of the Circuit Court to allow an individual to file an information, in the nature of a *quo warranto*, is a final judgment, which can be reviewed on a writ of error, whenever the object of the information is to ascertain the relator's rights to the usurped office or franchise. *The State, at the relation of Hill, v. Burnett.* 140.
2. In such a case it is immaterial whether the relator proceeds by a rule on the incumbent, to show cause, or whether he asks for leave to file the information. *Ibid.*
3. The cases in which the courts exercise a discretion in granting or refusing the leave, seem to be those in which the term of the disputed office will expire before the information can be decided; or when the relation is made by one not claiming the office. *Ibid.*
4. When the relation is made at the instance of one claiming the disputed office, and a *prima facie* case is made by his affidavits, he is entitled to be placed in the proper condition to assert his rights in due course of law; and all disputed facts must be determined by a jury. *Ibid.*

RECORD.

See Judgment and Decree, 3.

See Judgment and Decree, 7.

RELEASE.

See Notary Public, 1.

RIGHT OF PROPERTY, TRIAL OF.

1. If, on the trial of the right of property under the statute, the jury find a verdict for the plaintiff in execution, though the claimant become liable to satisfy the execution to the amount of the value of the property in controversy, yet the title to the same does not vest in him; consequently, it is not error for a judgment condemning the property, to direct that it be sold by the sheriff to satisfy the execution. *Fryer v. Dennis.* 144.
2. When the claimant of property is unsuccessful upon the trial of the right, he becomes liable for the costs of the proceeding, and the property in dispute cannot be sold in order to relieve him from the charge. *Ibid.*
3. The claimant of property levied on, cannot discharge his surety from the obligation incurred by their bond to the plaintiff in execution, (without the consent

RIGHT OF PROPERTY, TRIAL OF.—CONTINUED.

- of the latter,) by substituting a bond with other surety ; although such second bond be offered for the purpose of restoring the competency of the surety in the first as a witness. *Ibid.*
4. The claimant of property levied on, cannot object to any irregularity in the judgment or execution. *Ibid.*
 5. Since the enactment of the act of 1828, Digest 169, 5 and 55, the bond which the claimant of property levied on by execution, is required to give, before a trial of the right of property is had, should be made payable to the plaintiff in execution. *Bradford v. Dawson & Campbell*, 203.
 6. The bond is intended as a security for the plaintiff in execution ; and if a defective bond is executed, the claim ought not to be dismissed, if the claimant will execute a proper bond, under the direction of the court, when the exception is allowed. *Ibid.*
 7. On the trial of the right of property under the statute, the plaintiff cannot be required to produce the judgment on which his execution issued, nor can the claimant be allowed to show the same to be an insufficient warrant for an execution. *Huff et al. v. Cox*. 310.
 8. A finding by a jury on a trial of right of property, in favor of the plaintiff in execution, is a condemnation of the property absolutely in discharge of the plaintiff's execution. *Williams & Battle v. Jones*, *Guardian*. 314.
 9. Where a bond is executed in pursuance of the act of 1828, "the better to provide for the trial of the right of property, and for other purposes," it operates "as a release by the claimant of damages against the sheriff or other officer," taking the property claimed in execution ; and consequently, operates as a discharge of the sureties in a bond to indemnify the sheriff for all damages which may be recovered of him, in consequence of a levy of the process : and such sureties are competent witnesses for the plaintiff on the trial of the right of property. *Towns & O'Brien v. Alford & Butler*. 378.
 10. Where property is levied on by execution claimed by a third person, and a bond given to try the right, the pendency of such a proceeding, will not prevent the owner of the property from maintaining an action at law to recover the same of the claimant. *Oden v. Stubblefield*. 684.

SALES OF CHATTELS.

1. A contract, absolute in its inception, and consummated by delivery of the property, will not be converted into a conditional sale, by an ambiguous phrase afterwards indorsed on it, even if such would have been its effect if a part of the original contract. *Caraway v. Wallace, et als*. 542.
2. C. sold to W. certain slaves on credit, and delivered them ; and sometime afterwards an agreement was entered into, and indorsed on the contract, by which it was stipulated that payment should be made within the next month, in the notes of other persons ; at which time, a *bill of sale of the slaves* was to be executed by the vendor. *Held*—That this was not sufficient to show that the parties intended to rescind the former sale, and convert it into a conditional one. *Ibid.*
3. Where a person purchases property with a knowledge of a defect in the title of a *remote* vendor, he may show in defence of his right, that his *immediate* vendor had no such notice. *Myers v. Peek's Administrator*. 648.

SET-OFF.

1. Unliquidated damages cannot be the subject of a set-off. *McCord v. Williams & Love*. 71.
2. A note payable in bank, assigned before it is due, is not subject to an off-set against the original payee, nor can proof be received that it was paid before due. *O'Hara v. The Bank at Hawkinsville*. 367.
3. The plaintiff cannot reduce the amount of a set-off by showing an error in the settlement, which led to the execution of the note sued on. *Hudnall, use of Redus v. Scott*. 569.
4. The plaintiff cannot make a set-off, to a set-off pleaded or given in evidence by the defendant. *Ibid*.
5. A permission to the defendant to use a bill of exchange as a set-off, and to be liable to the owner for the amount only in the event it can be made available as a set-off, is not such a property in the bill as to entitle the defendant to use it as a set-off. *Adams & Taylor v. McGrew*. 675.

SHERIFFS DEED.

1. A sheriff's deed cannot be collaterally impeached for any irregularity in his proceedings, or in the process under which he sells. All that is essential in such a case is, a judgment, execution thereon, levy and the sheriff's deed. *Ware v. Bradford*. 676.

SHERIFF AND SURETIES.

1. Upon a motion against a sheriff for the amount of a *feri facias*, upon a suggestion that the money could have been made by due diligence, and default made, it is necessary to support a judgment against a sheriff, that it be found affirmatively by the jury, that the money could have been made by due diligence. A finding by them that the sheriff is liable for the amount of the execution, and ten per cent. damages thereon, is not sufficient to authorize a judgment in a case of this summary character. *Adams et als. v. White*. 37.
2. In a summary proceeding against a sheriff, for a failure to return an execution, the notice should indicate whether the judgment sought to be recovered is such as is authorized by the act of 1807 or 1819. But where the notice states that the motion will be made "for the amount of a writ of *feri facias*," &c. it sufficiently shows that the proceeding was instituted under the act of 1819. *McRae et al v. Colclough*. 74.
3. A judgment may be recovered against a sheriff and his securities for the failure to return an execution, upon three days notice of the motion being given, *either* to the sheriff *or* his securities. *Ibid*.
4. In proceeding against a sheriff and his securities, for the failure to return an execution, it is not necessary, where the notice was directed to be executed on the sheriff alone, that it should set out the names of the securities; it is sufficient that they are entered of record when the motion is submitted.
5. It is not necessary that a notice to a sheriff, that a judgment will be moved for, &c. should be dated, especially when the coroner's return shows when it was served. *Ibid*.
6. It is not necessary that a notice to a sheriff, that a judgment will be moved for, should designate the day of the term when the motion will be made. *Ibid*.

SHERIFF AND SURETIES—CONTINUED.

7. The notice to a sheriff, *or* his securities, that a judgment will be moved for, may be subscribed by the plaintiff's attorney. *Ibid.*
8. It is no excuse for a sheriff who has failed to return an execution, that the plaintiff did not pay, or secure, or offer to pay or secure, to him his legal fees. *Ibid.*
9. It is no answer for a sheriff who has failed to return an execution, to alledge that he had more official business than himself or his deputies could perform. *Ibid.*
10. The act of 1807, which limits the period within which fines and forfeitures may be recovered, does not, (at least since the statute of 1832, "to limit actions against securities of officers,) apply to a proceeding against a sheriff and securities for failing to return an execution. *Ibid.*
11. In a motion against a sheriff and his securities, though the suretyship of the latter is not denied by a plea, yet the fact must be shown to *the court*. *Ibid.*
12. A sheriff charged with a failure to return an execution, cannot object, that the same was irregular; the more especially, if it appears upon its face to be regular, and the clerk issuing the paper recognizes it as his official act. *Ibid.*
13. Where a notice to a sheriff describes the execution as a writ of *fieri facias*, this is sufficient to indicate that it issued against the "*effects*," and not the "*person*." *Ibid.*
14. Where a notice is given to a sheriff, that a motion will be made for a judgment against him for the failure to return an execution, the motion must be made at the time appointed, or some other proceeding must be had to keep alive the notice; otherwise it will be regarded as having spent its force. *Armstrong v. Robertson & Barnwell*. 164.
15. Where a notice to a sheriff that a judgment will be moved for against him, is found in the transcript sent to the Supreme Court, if it has not been recognized by the judgment, or other entries of the inferior court, it will be treated as a nullity. *Ibid.*
16. *Semble*—although the record does not show that the defendant had notice that a judgment would be moved for against him, yet, if he appears, the irregularity will be waived. *Ibid.*
17. A defendant in a judgment being summoned as a garnishee, by a creditor of the plaintiff, answered, that he was indebted to the plaintiff in the judgment, &c., at the date of garnishment, but, that since that day he has paid the amount thereof to the sheriff, upon an execution in his hands: thereupon the plaintiff in the judgment, who had given due notice, moved the court for judgment against the sheriff for the amount so collected: whereupon, after providing that the attorney who obtained the judgment, should be paid his fees, and the garnishee his expenses for an answer, the court directed that the balance, after paying costs of the garnishment, should be paid over to the person at whose suit the same issued. Held, that the proceeding was erroneous, and that judgment should have been rendered against the sheriff on the motion. *Zurcher v. Magee, Sheriff, &c.* 253.
18. *Semble*—Where the right to receive money collected by a sheriff is contested, the court from which the execution issued, may, in some cases, decide the

SHERIFF AND SURETIES—CONTINUED.

question of right, as a guide and protection to the officer in the performance of his duties. *Ibid.*

19. When a sheriff returns that an execution has been levied on certain slaves, but sold the same to satisfy an older execution in his hands at the same time, he is not liable to a motion for a false return, if the facts, as stated by him in his return are true, although a sum of money may remain in his hands unappropriated, after satisfying the oldest execution. *Tarleton & Bullard v. Gibson.* 638.
20. *Quere*—Whether such a return will discharge the sheriff from liability, if proceeded against for making no return; and also, whether it is not his duty, after charging himself by a levy, to shew in his return every fact which is necessary to his complete discharge. *Ibid.*
21. The penalty against a sheriff for failing to return a *ca sa*, is five per cent. per month on the amount of the judgment; the fine to be imposed by the court in the exercise of a sound discretion, taking into consideration all the circumstances of the case. *Rogers v. Waters and others.* 644.
22. The sureties of a sheriff are not liable for a malfeasance of the sheriff, unless the act complained of, includes an omission to perform some duty imposed by law. *The Governor for use of Simmons v. Hancock & Harris.* 728.

See Garnishee, 6.

SLAVES AND PERSONS OF COLOR.

1. When a slave has been convicted of a capital offence, it is not a sufficient reason to arrest the judgment, that the jury have omitted to assess his value, and to ascertain what portion of it shall be paid by the State to his owner, in pursuance of the provisions of the act of 1824. [*Aikin's Digest*, 124, s. 60, 64.] *The State v. John, a slave.* 127.

STATUTES.

1. The third section of the act "To suppress the evil practice of carrying weapons secretly," which provides that the Secretary of State shall cause that act to be published for three months, &c., is merely directory, and the neglect of the Secretary to perform that duty, cannot defeat the legislative will. *The State v. Click.* 26.
2. Where no time is fixed for the commencement of the operation of a statute, it takes effect from its passage. *Ibid.*
3. The act of 3d of February, 1840, which makes it the duty of the judge of the Circuit Court, (in vacation, and without providing any mode for a trial by jury,) to hear and determine whether an election for sheriff has been legally or illegally conducted, and to certify the fact, when ascertained, to the Governor, in order that he may commission the proper person when the election is legal, or direct a new election when the first is declared void, cannot be construed as conferring judicial powers on the judges of the Circuit Court. Such a construction would bring the statute in direct opposition to the constitution, as it would, in that event, create a tribunal to determine between the conflicting claims of individuals to the same office, without providing any mode by which the right could be determined by a trial by jury. *Wammack v. Holloway.* 31.
4. The proper construction of the act of the 3d of February, 1840, is that the Judge of the Circuit Court acts in the character of a supervisor of the election,

STATUTES—CONTINUED.

- and ascertains the *prima facie* right of one of the claimants to the office, or rejects the claims of all, if the election is void, in order that the executive may issue the commission to him who appears to be entitled, if the election is legal, or that the executive may order a new election if the first was void, so that the office may not remain vacant during the progress of a judicial investigation, to the detriment of the public. *Ibid.*
5. Notwithstanding this act, any one who considers himself entitled to an office, by virtue of an election, can ascertain his rights by a *quo warranto*. *Ibid.*
 6. It is a rule of construction, founded on the principles of *general jurisprudence*, that a statute is not to have a retrospective effect, beyond the time of its enactment. *Boyce v. Holmes*. 54.
 7. The act of 1836, "for the relief of tenants in possession, against dormant titles," which secures to persons, under some circumstances, who are ejected by paramount title, the value of improvements made upon the premises during their possession, does not operate retrospectively, so as to entitle them to recover the value of improvements, made previous to the passage of the act. *Ibid.*
 8. The act of 1807, which limits the period within which fines and forfeitures may be recovered, does not, (at least since the statute of 1832, "to limit actions against securities of officers,) apply to a proceeding against a sheriff and securities for failing to return an execution. *McRae, et al. v. Colclough*. 74.
 9. The statute of 1826, which provides for the holding of a special term, "devoted exclusively to the civil and chancery docket," does not repeal the acts of 1807, and 1819, (as consolidated,) which authorizes a special session of a Circuit Court for the trial of a criminal cause. *The State v. Hughes*. 102.
 10. The first section of the act of 1826, "to provide a speedy remedy against the obligors in injunction bonds," applies only to bonds executed, in cases in which *the judgment shall have been enjoined*. *Dunn and Wife, et al. v. The Bank of Mobile, et al.* 153.
 11. Since the enactment of the act of 1826, Digest 169, 5 and 55, the bond which the claimant of property levied on by execution, is required to give, before a trial of the right of property is had, should be made payable to the plaintiff in execution. *Bradford v. Dawson & Campbell*. 203.
 12. When a deed of trust to secure certain creditors, is made by a debtor to trustees, and is executed by being signed and sealed as well by the trustees as by the debtor, the certificate by a justice of the peace, that the parties, naming the trustees and debtor, came before him, and severally acknowledged that they and each of them, signed, sealed and delivered the deed, for the purposes and consideration therein mentioned, is sufficient to admit the deed to record under the act of 1828, Digest 208, s. 5, 7. *Ibid.*
 13. When the certificate does not pursue the form required by statute, the deed may be looked into to support the defective certificate. *Ibid.*
 14. The act of 1838, Digest 208, s. 5, 7, is for the prevention of frauds, and directs that deeds of trust, which are not recorded within the time limited, shall be void, as to creditors and subsequent purchasers without notice. The registration is permitted to have the effect of notice, but it does not make the deed evidence for any purpose whatever. *Ibid.*
 15. Betting on the result of an election, *after* the election has been consummated, is not within the statute of 1830. (*Aikin's Digest*, 209, s. 49.) *The State v. Mahan & Henry*. 340. }

SURETIES—CONTINUED.

16. When an offence is created by statute, in general, it is sufficient for the indictment to charge the offence in the terms used in the statute ; but if superfluous allegations are added, and these show a case not within the statute, the indictment is bad on demurrer. *Ibid.*
17. The act of February, 1839, which authorizes an action to be brought against the representatives of a deceased partner, upon an affidavit being made, that the survivor is insolvent, &c., as it merely gives a remedy at law, in a case in which the remedy was in equity, without any interference with the right, operates retrospectively, so as to embrace liabilities incurred previous to its passage. *Bartlett & Waring v. Lang, Adm'rx.* 401.
18. The 40th section of the act of incorporation of the State Bank, is directory merely ; and, therefore, if a bill is purchased or discounted by the bank, for a larger sum than five thousand dollars, the contract is not therefore void.—*Bates & Hines v. the Bank of the State of Alabama.* 452.
19. A large loan made to one individual, and separate bills of exchange, for five thousand dollars each, taken as security, is within the spirit, if not within the letter, of the prohibition of the 40th section of the charter. *Ibid.*
20. The meaning of the prohibition contained in the 20th section of the charter is, that the bank shall not buy and sell goods, wares or merchandise, for the purpose of gain ; or do the ordinary business of a merchant, or trader ; or engage in the business of a broker, or commission merchant. *Ibid.*
21. The act of 23d December, 1837, to limit the accommodations of the Presidents and Directors of the Bank of the State of Alabama and its several branches, is, in effect, an expression of opinion by the Legislature, that the proviso to the 40th section of the charter of the State Bank, is directory merely. *Ibid.*
22. The second section of the act of December, 1837, to limit the accommodation of the Presidents and Directors of the Bank of the State of Alabama and its branches, impliedly recognizes the right of the bank to purchase from any one bills drawn on cotton. *Ibid.* 453.
23. The words, "grant, bargain, sell," do not, under the 20th section of the act of 1803, "respecting conveyances," import an absolute or general covenant of seisin, against incumbrancers, and for quiet enjoyment ; but amount to a covenant only against acts done or suffered by the grantor and his heirs. *Roebuck v. Duprey.* 535.
24. That section, in declaring the effect of the words, "grant, bargain, sell," when employed in a conveyance in fee simple "to the grantor or his heirs," is evidently misprinted—the term "*grantor*," must be construed to mean *grantee*. *Ibid.*
25. In the construction of statutes, they should be so interpreted, if practicable, that the intention of the Legislature may be carried into effect, and the spirit of the enactment preserved. Under the influence of this rule, the letter is frequently sacrificed to the general purposes and intention of the act. *Kennedy's Heirs and Executors v. Kennedy's Heirs.* 573.
26. The statute which requires the sheriff to advertise lands thirty days before the sale, is directory merely. *Ware v. Bradford.* 676,

See Judgment and Decree, 2.

See Amendment, 1.

See Gift, 3.

SURETIES—CONTINUED.

See Will and Probate of, 4, 5, 6, 8, 9, 10, 12, 13, 15, 17, 18.

See Surety, 1, 2, 3, 4.

See Chancery, 41.

See Admiralty, Proceedings of, 1, 3.

See Indorser and Indorsee, 5.

See Surety, 7.

See Bonds, Official, 1, 2, 3, 4, 5.

SUMMARY PROCEEDINGS.

1. Proceedings of a summary character must be sustained by the allegations and recitals in the record, and cannot be aided by intendment. *Zurcher v. Magee, Sheriff, &c.* 253.
2. In a summary proceeding at the suit of a bank, the court will not, in order to reverse a judgment, look to the notice and certificate found in the transcript; but if they are recited in the judgment entry, or are brought to the view of the court by bill of exceptions, it will then be permissible to point out such defects as are shown by the judgment or bill. *Lightfoot, et als. v. The Branch Bank at Decatur.* 345.
3. In summary proceedings, authorizing judgment on motion, the record must show affirmatively that the court had jurisdiction; nor is this dispensed with by the appearance of the party. *Bates v. The Branch Bank at Mobile.* 689.
See Sheriff and Sureties, 1.
See Sheriff and Sureties, 14, 15, 16.

SURETY.

1. When there are five sureties to a note, three only of whom are solvent, and the holder sues one who is solvent, jointly with one who is insolvent, the solvent surety, by the act of 1839, p. 73, can sustain a motion for judgment against his solvent co-sureties, and may recover against each of them one third of the sum for which judgment is rendered against him and his co-defendant. *Young v. Clark.* 264.
2. The act of 1839 applies as well to contracts then in existence as to those made in future; but with respect to the former, no execution can be sued out until the surety who obtains the judgment against his co-securities, has paid the whole or a part of the secured debt. *Quere*—Whether the same construction of the statute is not applicable to cases of future contracts. *Ibid.*
3. Under this act, the motion may be made either at the term when judgment is rendered in favor of the holder of the security, or at any subsequent term. *Ibid.*
4. When the holder of the security sues two sureties jointly, one of them may have the statutory motion against a surety not sued. *Ibid.*
5. An indorser is not a surety within the meaning of the act for the relief of securities, Aik. Dig. 385, nor entitled to the benefit of the 6th section of that law; although such indorsement was made for the accommodation of the maker of the note. *Bates v. The Branch Bank at Mobile.* 689.
6. If one co-surety to a note gives notice to the plaintiff to proceed by law to collect the note, and he is discharged by the omission of the plaintiff to sue, according to the notice, the principal becoming insolvent, all the other sureties are discharged by the same omission. *Towns v. Riddle.* 694.
See Partner and Partnership, 12, 13.

TRUST AND TRUSTEE.

1. Courts of equity administer remedies for rights in cases in which courts of law recognize no rights at all, or, if recognized, they are left to the conscience of the parties. Trusts are without any cognizance at common law; but they are cognizable in courts of equity, and a remedy is there given to the parties, beneficially interested, for all injuries arising, either from negligence, or positive misconduct. *Kennedy's Heirs and Executors v. Kennedy's Heirs.* 572.
2. Parol evidence is admissible to show the fraudulent use of a deed; or that a party receiving an absolute deed, upon a promise that he would dispose of the property conveyed by it in a particular manner, refused to perform his promise. *Ibid.*
3. Although courts of equity look with jealousy and suspicion upon a purchase made by a trustee of his *cestui que trust*, or by an agent of his principal; yet such purchases are allowable, if the purchaser made a full and fair disclosure, and took no improper advantage. *Ibid.*

See Chancery, 50.

VENDOR AND VENDEE.

1. Where one was induced to purchase land by the fraudulent representations of the vendor, in relation to the title, the falsehood of which the vendee had no means of ascertaining, by the exercise of ordinary diligence, he may have relief in Chancery before eviction, and without abandonment of possession. *Younge v. Harris' Administrator, et al.* 108.
2. A vendee of land cannot entitle himself to a rescission of the contract, by tendering the purchase money, and demanding title before the time stipulated by the contract for making the title. *Clements v. Loggins.* 514.
3. Nor is it any objection that the title is not then in the vendor, if he can obtain the title. *Ibid.*
4. Where C., about to sell a tract of land represented to the proposed purchaser, that an open unmarked line would run in such a direction as to include a field of forty acres of rich bottom land on an adjoining tract, when he had been previously informed by the owner of the land, that he had made an experimental survey, and found that the line would run so as not to include the field, as part of the land of C.; which, upon a survey, was found to be the fact,—Held, that this was such a fraudulent representation of a material fact, as would authorize a Court of Chancery to rescind the contract. *Camp v. Camp.* 632.

See Chancery, 12, 13, 14.

VENUE.

1. The question of change of venue, is one addressed to the sound discretion of the court to which the motion is made, and therefore cannot be reviewed in an appellate court. *The State v. Brookshire.* 303.

VERDICT.

1. It cannot be objected to a verdict that it is too broad, if every essential matter put in issue is concluded by it. *McRae, et al. v. Colclough.* 74.
2. The omission of the jury to take with them, from the bar, the defendant's plea, is no objection to the verdict. *Ibid.*
3. A court will so mould and construe a verdict, as to make it legal, if possible, and will never give to it the opposite construction, unless forced by the terms in which it is expressed. *Toulmin v. Lesesne & Edmondson.* 359.
4. A verdict is not vitiated because a jury find something superfluous. *Ibid.*

VERDICT—CONTINUED.

5. Though a verdict need not follow the language of the issue, yet it must be responsive to it, and so expressed, as to shew that the jury decided the question submitted to them. *Ibid.*
6. Where the defendant was charged in an action of *trover*, with the conversion of personal property, and the cause being submitted to the jury, on the plea of "not guilty," they return a verdict, "that the defendant doth detain," &c. the property mentioned in the declaration, and assessed its value. *Held*, that this verdict is insufficient, and that it is not conclusive of the point in issue. *Ibid.*
7. The jury may announce their verdict to the Court, *ore tenus*, or in writing; but however rendered, it may be varied by them before they are discharged from the consideration of the case, so as to make it speak their intention; and a change thus made need not be noted in writing. *The State v. Underwood.* 744.
8. Where a written verdict is found in the papers, variant from that recited in the judgment, the *prima facie* intendment is, that the recital in the judgment is correct. *Ibid.*

WARRANTY.

1. To entitle the vendee to recover for a defect in the quality or soundness of the property sold, except under special circumstances, he must show either a warranty, or that the seller concealed, or fraudulently represented its qualities. *Barnett v. Stanton & Pollard.* 181.
2. No form of words is necessary to constitute a warranty. A bare representation or assertion, if so *intended and understood* by the parties, will amount to a warranty; but, though the representation of the seller be positive, it will be regarded as an expression of his belief or opinion, unless it was *intended and received* as a stipulation, that the quality of the property was such as it was represented. *Ibid.*
3. *Quere*—on the sale of an article of merchandise, will the law imply a warranty that it is merchantable, or fit for the purpose for which it was sold and purchased? *Semble*—that such a warranty has never been implied, where the article was open to the inspection of the vendee before the purchase. *Ibid.* 182.
4. A vendee who would rescind a contract for breach of warranty or fraud, must act with promptness, and take the legal steps for that purpose as soon as the breach or fraud is discovered. If the vendor reside at a distance from the vendee, an offer to return a chattel may be made through the medium of the *post office.* *Ibid.*
5. Where goods are open to inspection, and are actually examined before the sale, there is no implied warranty of quality, though the manufacturer himself may be the vendor. *Barnett v. Stanton & Pollard.* 195.
6. Where an estate of freehold was granted by the words *dedi et concessi*, or *dedi* only, according to the English common law, a *warranty of title* was implied. *Quere*—Does the word "*give*," employed in a deed of bargain and sale, import such a warranty in this State. *Roebuck v. Duprey.* 535.
7. The words, "grant, bargain, sell," do not, under the 20th section of the act of 1803, "respecting conveyances," import an absolute or general covenant of seisin, against incumbrancers, and for quiet enjoyment; but amount to a covenant only, against acts done or suffered by the grantor and his heirs. *Ibid.*

WILL AND PROBATE OF.

1. If an instrument be in the form of a deed of gift, and called such, still, if its purpose be testamentary, and it is only to be consummated by death, it will be admitted to probate as a will. *Dunn and Wife, et al. v. the Bank of Mobile, et al.* 152.
2. A gift by will to children born, and to be born after it takes effect, is good as an executory devise, as it respects the after born children. *Ibid.*
3. A bequest to a married woman and her children, born and thereafter to be born, makes them tenants in common—joint-tenancy and its consequences being abolished in this state. *Ibid.*
4. The statute of 1806, provides a common mode by which wills, either of real or personal estate, may be established in the first instance before the county courts. *Johnson and others, complainants, v. Glasscock and wife, and others, defendants.* 218.
5. The 55th section of the same statute also provides a new mode by which the heir at law, or nearest of kin to the testator, can contest the will, so that one suit will be conclusive and final; and for this purpose has invested the Court of Chancery with the jurisdiction, authorizing it to call in aid the assistance of a jury as in other cases. *Ibid.*
6. The same section also provides a period of limitation, much shorter than before was known, after which a will submitted to probate, ceases to be the subject of controversy, and becomes entirely conclusive on all parties interested. *Ibid.*
7. The probate obtained in the County Court, is not *prima facie* evidence of the validity of the will in the contest in Chancery. The opportunity given to the heir at law, or nearest of kin, to contest the will in Chancery, is given in the place of the proof, in *solemn form*, of a will of personal property; and of the action of ejectment, when the will is of real estate. *Ibid.*
8. The investigation in Chancery must be governed by the same rules and laws which prevailed in similar investigations in the ecclesiastical courts, when the will affects personal estate, and the courts of common law, when it passes the real estate, except so far as the statute provides a new rule. *Ibid.*
9. In either of these courts, the person claiming under the will is placed in the condition of an *actor*. Nothing more is necessary, in framing a bill to contest a will under the statute, than to alledge the title, by which the complainant has the right to investigate the probate, and a prayer for relief. If a discovery is wanted, or the circumstances of the case require an injunction, &c. the bill may be framed with a view to such circumstances. The answer should aver every fact and circumstance necessary to make a good will. *Ibid.*
10. *Quere*—Whether any probate of a will under the statute, is necessary to enable a *devisee* to maintain or defend an ejectment for the lands devised. *Ibid.*
11. The validity of a nuncupative will does not depend on the fact of its being reduced to writing, either before or after the death of the testator, *unless* the probate is deferred for a longer period than six months after the words were spoken. The proof, when the will is contested in Chancery, must be of the same quality and degree, (except so far as other evidence is authorized by the 55th section of the statute,) as was proper when the probate was had in the County Court. *Ibid.*
12. *Quere*—Whether the *rogotia testium*, in any case, is necessary to be committed to writing, as a part of a nuncupative will, as the statute of 1806 differs from the English statute of frauds in its terms. *Ibid.*
13. The words *last sickness*, in the statute, are not to be construed to mean *in extremis*. If a person in last sickness—that sickness of which he subsequently dies—impressed with the probability of approaching death, deliberately makes his will, conforming to the statute, the will will not be invalid, because he had time and opportunity to reduce it to writing. *Ibid.*
14. In such case, however, the evidence ought to be of such weight as to leave no doubt on the mind of the judge or jury, that the will offered for probate, was, in truth, the will of the deceased; and whenever a will is so made, the court must be more on its guard than it would be in an ordinary case. *Ibid.*

WILL AND PROBATE OF—CONTINUED.

15. The statute does not provide what number of witnesses shall be necessary to prove a will of personal estate ; therefore, the law in force previous to the enactment of the statute must govern. The common law, properly so called, provided no rules with relation to wills of personal property, but adopted the practice prevailing in the ecclesiastical courts. This was governed by the civil and canon laws. The same rules and practice must govern similar cases in this State. *Ibid.*
16. By the civil and canon laws, two witnesses, in general, are necessary to establish a will of personal estate ; and the same number is required in this State, whether their testimony is to be given before the Probate Court or the Court of Chancery. *Ibid.*
17. Under the 55th section of the act of 1806, the certificate of the oath of the witnesses, at the time of the taking the probate, is made evidence to be admitted to the jury, to have such weight as they may think it deserves, on the trial of an issue in fact out of Chancery. The same evidence is admissible when the Chancellor decides on the proof without directing an issue. *Ibid.*
18. This section of the statute was, doubtless, intended to protect persons claiming under a will, against the *impossibility* of establishing it, if the witnesses were to die after the probate, but before the contest in Chancery ; and from the *difficulty* of so doing, when, after the probate, they could not be found. The intention of the statute will be best carried into effect, by considering the examination of the witnesses, at the time of the probate, as an examination in chief, leaving it to those who subsequently contest the will, to cross examine the same witnesses, if they deem it important or necessary to do so. *Ibid.*
19. Nuncupative wills are not favorites with Courts of Probate. Much more is requisite to the proof of such a will, than of a written one, in several particulars. In the first place, numerous restrictions are imposed on such wills by the statute, the provisions of which must be strictly complied with. But, added to this, and independent of the statute, the *factum* of a nuncupative will, requires to be proved by evidence more strict and stringent than a written one, in every single particular ; and unless the court is morally certain, by pronouncing for the will propounded, of carrying into effect the deceased's real testamentary intentions, and no other, it is obviously its duty not to give the will the sanction of its probate. *Ibid.*
20. Where the facts stated in the record of the probate, as having been proved when the will was admitted to probate, are inconsistent with the facts proved on hearing in chancery, a strong presumption of fraud arises, which can only be counteracted by showing that no such evidence was given at the probate, and by accounting most clearly and satisfactorily for the, in that event, false language of the record. *Ibid.*
21. The rule is perfectly well established, that when a bill is impeached on the ground of fraud, the parties who seek to establish it, must remove or explain, and so neutralize the facts out of which the suspicion arises. And this rule is held to apply also to fraudulent acts in relation to the obtaining of the probate. *Ibid.*
22. After a decree in Chancery, sustaining the probate of a nuncupative will, has been reversed by this court, and a decree rendered, setting aside the will as not satisfactorily established, the case will not be remanded, to let in further evidence to explain discrepancies in the evidence. *Ibid.* 249.
23. It is the settled practice of equity, to direct *an issue at law*, where a question arises upon the validity of a will ; and it seems, that it would be irregular to render a decree against the heir, until the invalidity of the devise had been found by a jury. According to the practice of the English Chancery, it is usual to direct an issue to try whether A. is heir, &c. or the existence of a *modus decimandi*, or a real and immemorial composition for tithes. *Kennedy's Heirs and Executors v. Kennedy's Heirs.* 573.
24. Land acquired after the execution of a will, does not pass by a general devise ; nor will a power contained in the will, to sell all the estate of the testator, authorize the executor to sell after-acquired land. *Meador & Meador v. Sorsby.* 712.
25. Whether after-acquired land may not pass, by a will clearly indicating such an intention.—*Quere.* *Ibid.*

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